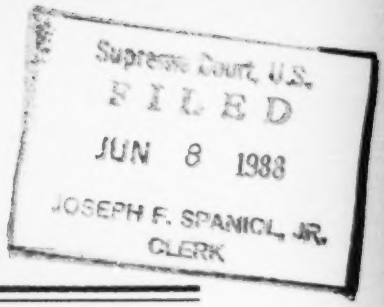
87-2022



No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT ANDERSON, JR., *et al.*,
Petitioners,

vs.

SLATTERY GROUP, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SHELDON WEINHAUS
906 Olive Street, Suite 900
St. Louis, Missouri 63101
314/621-8363
Attorney of Record for Petitioners

LEVIN and WEINHAUS
906 Olive Street, Suite 900
St. Louis, Missouri 63101
Of Counsel

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED

1. Does not ERISA's intent that trust principles be applied and ERISA's intent that information given to participant allow him to know where he stands, govern retirement benefit actions so that the drafters bear the burden to establish by objective and unequivocal evidence their intent that the duration of retirement group insurance benefits is transitory where the ERISA-mandated summary plan description states that such coverage for retirees will continue "for the remainder of your life"?

2. Does national labor policy require that a summary plan description mandated by ERISA, 29 U.S.C. §1022, be used to construe plan terms?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were:

1. The petitioners are listed in the appendix, page A68. They had been workers at the first named respondent's St. Louis plant. The district court certified petitioners to be representatives of a class consisting of some 453 hourly retirees of Alpha Portland Industries, Inc. who had been employed and retired from said respondent's nine plants situated in various parts of the United States.

2. The two principal respondents are: Alpha Portland Industries, Inc., a corporation, and Alpha Portland Industries, Inc. Insurance and Health Plan for Hourly Employees, an ERISA welfare benefits plan ("Alpha respondents"). Alpha Portland Industries, Inc. changed its name in 1985 to Slattery Group, Inc.

3. A third respondent is The Equitable Life Insurance Society of the United States. Its interest would be solely with respect to administration of a remedy if liability exists on the part of the principal respondents named above.

4. A fourth respondent under this Court's Rule 19.6 is the United States of America, which was permitted by the district court to intervene. Its interest in the outcome of the instant proceeding is similar to petitioners.

The United States filed a separate complaint against the Alpha respondents, asserting against such respondents a liability similar to that asserted by the petitioners. Its claim was bifurcated, to be heard only if there were a determination of liability on petitioners' claim.

5. The four remaining respondents are the International Brotherhood of Boilermakers, the Cement, Lime, Gypsum and Allied Workers Division of the International Brotherhood of Boilermakers, Charles F. Fuch and Charles C. Huntbach, all of whom were third-party defendants in the district court. The third-party action was also bifurcated by the district court and no adjudication has been entered. These respondents are not anticipated to have any interest in these proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Code:

Legislative Materials:

Arbitration Decisions:

Other Authorities:

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT ANDERSON, JR., *et al.*,
Petitioners,

vs.

ALPHA PORTLAND INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Robert Anderson, Jr., et al, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on January 13, 1988. That judgment involves three important and recurring questions under the Employee Retirement Income Security Act of 1974 ("ERISA") and federal labor policy: (1) whether contract principles alone are to be considered in benefit actions; (2) when formal, complex plan language does not expressly address the duration of retirement benefits already commenced, who has and what are the proof burdens as to benefit longevity and how are the proof burdens to be met; and (3) what is the role of a Congressionally mandated summary plan description which unequivocally and in understandable terms informs that benefit coverage for retirees are to continue for life.

There are irreconcilable, diverse views among the circuits with respect to each of the questions posed. Retiree benefit issues are a matter of national concern. Review by this Court is urgently needed to guide the lower courts, to establish a uniform policy, and to reaffirm ERISA's intent that participants are to be protected in the information provided to them in Congressionally mandated form.

In the context of an eligibility determination by Section 408 fiduciaries this Court is now entertaining argument on the first question raised, limitation of benefit actions to contract principles. *The Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054, 56 U.S. Law Week 3676 (1988). The issues in the instant case include but extend beyond the question whether a contract-only approach is correct.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 836 F.2d 1512 and is reprinted in the Appendix, page A1.[1]

The memorandum decision of the United States District Court for the Eastern District of Missouri (Hungate, D.J.) is reported at 647 F.Supp. 1109, and is reprinted in the Appendix, page A22.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. §§1132(a) and 185(a), petitioners brought this suit in the Eastern District of Missouri. On September 30, 1986, the Eastern District after bench hearing, entered Findings of Fact and Conclusions of Law, finding in favor of the first three respondents herein, and

---

[1] References to "A" pages are to the Appendices to this Petition. The Appendices are in a separate volume.

against petitioners, and dismissed petitioners' action. See page A21. It further entered an order under Rule 54(b), Federal Rules of Civil Procedure, finding that there was no just reason for delay of judgment against the petitioners and expressly directed the entry of judgment against petitioners, allowing appeal by petitioners to the United States Court of Appeals for the Eighth Circuit.

On petitioners' appeal, the United States Court of Appeals for the Eighth Circuit on January 13, 1988 entered a judgment and an opinion affirming the Eastern District's dismissal. See page A1. Petitioners filed a petition for rehearing with the Eighth Circuit. On March 14, 1988 the Eighth Circuit entered an order advising that it had considered the request for rehearing and denied it as well as petitioners' petition for rehearing by the panel. See page A62.

This petition is filed within 90 days of that March 14, 1988 ruling denying rehearing en banc and by the panel.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Statutes involved in this case are 29 U.S.C. §§1001(a) and (b) and 1022 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.*, and 29 U.S.C. §185(a) of the National Labor Relations Act. Congressional disclosure and information concerns and purposes are set out in Section 2 of ERISA, 29 U.S.C. §§1001(a) and (b). Section 101 of ERISA, 29 U.S.C. §1021, imposes the framework for information requirements, and the next section, 102, *id* §1022, specifies what information is to be given participants and beneficiaries and exactly how it should be written. These statutory provisions and other relevant provisions of ERISA are set forth in the appendix. A63-A67.

STATEMENT OF THE CASE

Retirees of Alpha Portland Industries, Inc ("*Alpha*") brought this class-action suit to continue group life insurance and health benefits they started receiving upon retirement after individually fulfilling all conditions for the benefits. A24. The benefits were unilaterally terminated by Alpha upon the expiration of the union contract in 1982.

Prior to 1973 there was no formal plan, only booklets drafted by Alpha. Prior to 1965 Alpha's booklets advised that certain group insurance benefits would continue for those retiring, but retirees were required to share part of the cost. No specific reference to durational limits for those retirement benefits appeared.

In 1965 the union won Alpha's agreement that starting in 1966 retiree benefits would be cost free "until death of retiree." A4, A30. Alpha offered no testimony from any of its 1965 benefits negotiators, but it was allowed to offer testimony from other management that they understood the "until death" language was adopted with the intent to limit dependent coverage. A31, A12. Union negotiators testified they understood in 1965, and thereafter they assured workers before contract ratification votes as well as at other times, that retiree benefits were guaranteed for the duration of the retiree's life. A31, A59. The international union president published handbooks telling members of the 1965 cost-free "until death of retiree" agreement, assured there were "no subtractions" when he and Alpha's representative formalized a plan agreement in 1973 as part of the labor agreement, and his printed booklets boasted a bargaining history of only improvements. His handbooks made no mention that retirement benefits were terminable upon expiration of the labor agreement, nor did the handbook suggest the meaning Alpha's witnesses gave to the 1965 agreement.

The employer's plan administrators at its various cement plants located throughout the country, its plant management and its chief labor negotiator, historically assured workers that once retired, the benefits in issue continued for the rest of their lives. A59. The Eastern District viewed such testimony of oral statements as subject to "conflict," A57, but it did not resolve this factual conflict. A59. However, the Eastern District did find there was no question that ever since the mid-60's agreement providing retiree benefits be cost-free "until death of retiree," the Alpha's plan drafter and principal witness on contract meaning, wrote retirement letters using such terms as "lifetime" and advising of events that would occur long after the expiration of the labor agreement. A53-A54. It also found that in early 1978 Alpha distributed a summary plan description ("SPD") mandated by 29 U.S.C. §1022, advising retirees that such benefit "coverage will continue for the remainder of your life." A50-A51. The Eastern District characterized such documentation as "indicating that insurance benefits would continue for life." A59. With such information workers voted to ratify the labor agreements before they could become effective. The 1978 summary plan description was never later amended, corrected or modified.

The formal language the drafters agreed upon starting in 1973, called for continuation of retiree benefits, permitted amendments "hereinafter," coordinated benefits with Medicare and contained a plan-duration clause *void* of the words "terminate" and "benefits."

The Eastern District would consider the case only in terms of contract breach. It rejected consideration of all trust principles. A11. No Congressional purposes were considered since pensions were not involved. A55-A56. Recognizing that the formal plan terms were ambiguous, the Eastern District credited the trial testimony of the drafters, A15, A40, A56, that the drafters had actually intended retiree benefits expire with expiration of the collective bargaining agreement. A40, A56. This testimony

was admitted over objection and without a showing of timely communication. A31. The Eastern District cited *no unequivocal, objective* evidence of such intent existing at any time before the end of 1981 when Alpha made the decision to terminate its cement business and all retiree benefits. In deposition testimony offered by petitioners at trial, the drafters admitted that after agreeing on formal language in 1973, they had not prior to the time of that late-1981 decision, ever unequivocally told workers that their original and continuing anticipation was that retiree benefits terminate upon expiration of the labor agreement.

Although the Eastern District made no finding that workers were unequivocally told of any transitory intent by either the employer or union *before* the late-1981 decision, it allowed as evidence conduct by the union and employer that occurred after the decision was made by Alpha in late 1981 to terminate operations and retiree benefits. It considered as meaningful the union president's initial revelation of his intent in 1982 when Alpha was threatening to stop dues check-off and sell its remaining plants to anti-union bidders if the union did not accede to the termination of retiree benefits. Only then did the union president write to protesting retirees to explain why no challenge was intended by the union. The Eastern District looked to other union conduct then occurring. A51 ¶47, A53 ¶63, A59-A60.

The United States Court of Appeals for the Eighth Circuit agreed denial of welfare benefits creates only contract questions. A9. It accepted the Eastern District's finding of ambiguity in the formal plan terms, A11, to allow the court to consider the drafter's testimony of prior actual intent. A15. It would give no consideration to trust principles, nor consider the purpose of ERISA or whether ERISA requirements had been met. It held under law and custom that benefits for retirees expire with the expiration of the labor agreement, unless retirees *prove* the drafters actually intended the benefits were to last for the retiree's lifetime.

The court of appeals also held that petitioners' proof burden could not be met by the statements made in the Congressionally mandated summary plan description or by the history of either the prior oral and written statements by employer and union personnel which the Eastern District characterized as "indicating that insurance benefits would continue for life." The summary plan description was held "faulty" because it was inconsistent with the drafters' credited testimony of their prior actual intent. If "faulty," the court of appeals held the summary plan description was not to be used to construe the plan terms. A15.

That benefits continued during earlier strikes when there were no contracts, A53, the court of appeals rejected as objective evidence the benefits were not intended to be tied into the term of the labor agreement. A11. The court of appeals did not address petitioners' argument the trial court in its "four-corners" analysis must consider other provisions in the formal agreement that advised which benefits for retirees continued and which terminated with retirement, e.g., A50, and also article X of the labor agreement labeled "Employee Retirement Income Security Act of 1974," that specifically stated that the plan terms met ERISA requirements to tell "the circumstances under which the insurance terminates."

The court of appeals also held the summary plan description stating that the group insurance benefit coverage for retirees continued "for the remainder of your life," was not an enforceable plan document. Even on the limited contract breach question, the Eighth Circuit held the summary plan description need not be used by the trier to construe the ambiguous terms of the formal document or to derive intent absent a prior showing of worker *reliance* thereon. A17-A18. Such reliance could neither be inferred nor presumed even though the summary plan description had been issued to workers before they participated in ratification votes required by the labor agreements. Petitioners' testimony of assurances made at ratification meetings

and the actual provisions in the agreements requiring those ratification votes before the agreements were to become effective, were ignored.

Petitioners' petition for rehearing and rehearing en banc was denied, A62, and petitioners now seek review in this Court.

REASONS FOR GRANTING THE WRIT

Even before ERISA the circuits had taken a range of vastly diverse approaches to resolve questions of duration of retirement benefits. Although ERISA was designed to create a federal uniformity, uniformity has not been achieved in this area. Predictability of outcome remains totally dependent upon which forum is chosen. Only a ruling by this Court can create the uniformity that Congress intended to establish by enacting ERISA.

This case presents the conflict in its starkest form, not merely because one circuit calls another "illogical" and one circuit disagrees with others as to the effect of the summary plan description Congress mandated, but because the class of retirees come from plants in a number of different states, and had they filed suit in other circuits in which others of Alpha's plants were situated, they would have review by a court that takes a far different approach, views the summary plan description differently and construes substantially the same formal clauses to conflict with the Eighth Circuit's construction.

Moreover, practically every benefit plan in the country coordinates benefits with Medicare and contains amendment and duration-of-plan clauses. If the Eighth Circuit is correct that each such clause "is inconsistent with vesting," A15, there are essentially no retirees in this country entitled to continuance of group insurance benefits. Yet other circuits find the benefits are vested and order such benefits be continued.

The court of appeals decision not only goes far beyond that of any other circuit that has addressed the issues raised here, it contravenes the public policies Congress adopted in passing ERISA. By allowing testimony as to what was years-prior actual intent, also a violation of elemental hornbook contract principles, and by allowing that testimony to be used to give meaning to other equivocal, complex clauses and to render "faulty" and meaningless a Congressionally mandated document pro-

viding specified information in a specified way, the Eighth Circuit in effect abolished ERISA Section 102, 29 U.S.C. §1022, for welfare benefits and rejected Congressional intent that the individual participant, not the plan drafters, "know exactly where he stands" and be armed with enough information to enforce his/her own rights.

By its finding that the duration of benefits are by law and custom tied into the term of the labor agreement providing them, the court of appeals radically departed from the views of the other circuits as well as of this Court. If the Eighth Circuit is correct, that no matter what information the participant receives and no matter the format thereof, the benefit remains tied into the duration of the contract unless he can prove the *actual intent* is consistent with the information given him in Congressionally mandated form, the retiree is compelled to demand to continue his union membership to secure bargaining renewal of the benefit, swelling the ranks of many substantially depleted unions.

The holding is also a radical departure from other circuits and the views of this Court with respect to the relationship between retirees and their former union.

If the holding of the Eighth Circuit is permitted to stand, millions of retirees will be affected. The federal courts are already flooded with litigation in this area, and much more can be expected if years after the workers' retirement, their employers and unions are free to reverse their own unequivocal explanations given in summary plan descriptions and before ratification votes. The decision of the Eighth Circuit cries out for review and reversal by this Court.

I. A Split in the Circuits Now Exists

The reported cases reveal plan drafters ordinarily and historically use equivocal language to express the duration of retirement benefits. See, e.g., *Upholsterers Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967).

The circuits are now in disagreement with respect to what principles of construction are to be applied, and whether there are any federal policies to be served, in determining under what circumstances benefits become "vested" when the worker retires. In spite of the large number of prior decisions there still exists much confusion about what (1) standards are to be applied, (2) what is the appropriate relevant construction of plan amendment, benefit coordination and plan duration provisions, and (3) what principles are to be drawn from federal labor and ERISA policy.[2] Until the present decision one circuit had not openly criticized another. In the instant case the Eighth Circuit expressly characterized the Sixth Circuit's approach as "illogical" and accused it of being improperly "gratuitous."

The Sixth Circuit in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert den'd 456 U.S. 1007 (1984), proposed in a contract-breach setting void of any summary plan description or other revealed employer explanation, that if the participant started receiving the retirement health benefit, the participant is relieved from the burden of showing a "clear manifestation of intent." *Id.* at 1481 n. 2. The Eighth Circuit always requires the retiree to bear the full burden on intent, A10, A11, rejecting the Sixth Circuit's explanation that under this Court's decision in *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181-182 (1971) (*"Chemical Workers"*), ordinarily participants are justified to

---

[2] See, e.g., J. Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 Industrial Rel. L.J. No. 2 p. 183 (1987); Weckstein, *The Problematic Provision and Protection of Health and Welfare Benefits for Retirees*, 24 San Diego L. Rev. 101 (1987); Note, *Retiree Welfare Benefits: ERISA, LMRA and the Federal Common Law*, 20 Akron L. Rev. 455 (1987); L. R. Page, *Retiree Insurance Benefits: Enforcing Employer Obligations*, 4 Compensation and Benefits Management 19 (Autumn 1987); T. Barnes & C. Mishkind, *Retirees Health & Welfare Benefits: Controversy Over Their Duration*, 10 Employee Rel. L. J. 584 (1985).

anticipate retiree benefits would continue without the possibility of being adversely affected in the future by younger workers. Unless the language was unequivocal, the Sixth Circuit concluded "that the parties likely intended those benefits to continue." 716 F.2d at 1482. The Ninth Circuit expressly sides with the Sixth Circuit. *Bower v. Bunker Hill Corp.*, 725 F.2d 1221, 1225 (9th Cir. 1984). The Eighth Circuit finds this rationale "illogical," A10, and "gratuitous." A11. The Eighth Circuit's views would always give younger workers the say-so, finding retiree benefits are tied into the term of the labor agreement as a matter of law and custom.

The Eighth Circuit pronouncement that it is understood by custom and law, that benefits for retirees end with expiration of the current union agreement and are "tied to the agreement which created them," A14, A9,[3] conflicts with other circuits. See *District 17, United Mine Workers v. Allied Corp.*, 765 F.2d 412 (4th Cir. 1985) (damages for loss of health benefits extend into future under agreement which guaranteed benefits only "during the term of this agreement"); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 5 (1st Cir. 1978), cert den'd 440 U.S. 913 (1979) (earned benefit continues beyond contract expiration and regardless of clause that expressly permits plan discontinuation).

Apart from the meaning to be given to this Court's decision in *Chemical Workers, supra,* whether this Court would accept the Eighth Circuit's view that benefits are understood by law and custom to expire with the expiration of the labor agreement, is questionable. E.g., *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550-51 at n.9 (1966) (union's claims to severance

---

[3] The Eighth Circuit's citation to the evidence on this, A7, comes from the Eastern District's acceptance of the testimony of a non-enrolled ERISA actuary on what was "customary practice in the industry." A54 ¶58.

pay benefits following contract expiration held arbitrable); *Nolde Bros., Inc. v. Bakery Workers Local 348*, 430 U.S. 243 (1977) (severance pay benefit claim after contract expiration arbitrable). See also *Steelworkers v. Canron, Inc.*, 580 F.2d 77 (3rd Cir. 1978) (dispute whether retiree health benefits continue after contract expiration, is arbitrable). Reported arbitration decisions reveal labor arbitrators do not find the retirement benefit to be tied into the term of the labor agreement. E.g., *In the Matter of the Arbitration Between United Steelworkders of America, AFL-CIO and Whitehead and Kales, Division of Johnston Group, Inc.*, 7 EBC 1013 (1986); *Black, Sivalls & Bryson, Inc. and Tec Tank, Inc.*, 81-1 ARB ¶ 8277 (1980); *Roxbury Carpet Company*, 73-2 Arb ¶8521 (1973); *American Standard, Inc.*, 57 L.A. 598 (1971). Thus there is a substantial body of law in direct conflict with the court of appeals' premise that by law and custom retirement benefits expire when the labor agreement ends.

To the extent the Eighth Circuit believed that the Sixth Circuit later retreated, A10, it should be noted that in that case the Sixth Circuit Court of Appeals held that the retirees should still be successful. *International Union, UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808-10 (6th Cir. 1984) (even lack of legal presumption of lifetime intent based on retirement status, suggests no error in district court finding "the inherent duration of the retirement status beyond any particular contract" supported conclusion the parties intended for the benefits to continue for the life of the retiree). See also *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616 (6th Cir.1985); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985).

The split between the Sixth and Eighth Circuits on contract breach proof burdens, on the meaning of plan terms,[4] on

---

[4] Examples of conflict in the meaning of similar plan terms are presented infra pp. 17-18.

evidence, and on inferences and presumptions, is further pronounced if the instant case is considered in terms of what are the legal duties of the drafters imposed by ERISA and the Congressional concerns that led to enactment of far stronger information provisions than ever before known to the law. In the Sixth Circuit cases there was no summary plan description containing terms similar to that present in the instant case.

Congress prescribed exactly what information was to be given and how. *Teamsters Local 705 v. Daniel,* 439 U.S. 551, 569-70 (1979) ("ERISA fills the regulatory void," requiring disclosure of "specified information to employees in a specified manner"). Congress recognized "a need for more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan — what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits." S.Rep. No. 93-127, 93rd Cong. 1st Sess. 27 (1973), reprinted in 1974 U.S. Code Cong. & Admn. News 4838, 4863. To carry this purpose out, Congress mandated the summary plan description "shall be written in a manner calculated to be understood by the average plan participant" and the SPD was to state the "circumstances which may result in . . . denial or loss of benefits." 29 U.S.C. §1022.

The Eighth Circuit appears to conclude that these ERISA protections have applicability only to pensions, A8-A9, but the Department of Labor's position has been that the statutory obligation of disclosure of circumstances leading to loss applies to retiree welfare benefits every bit as much as to pensions. ERISA Technical Release 84-1, reported in CCH *Pension Plan*

Guide ¶ 23,653H.[5] See also *Bower v. Bunker Hill Corp., supra,* 725 F.2d at 1225 (Court must consider what ERISA mandates and DOL requires in summary plan description). In the face of the Eastern District's finding that the documentation Congress mandated "indicat[ed] that the insurance benefits would continue for life," A59, the Eighth Circuit's demand that the drafter's actual intent, even if never clearly and unequivocally disclosed in a timely manner, is relevant and must be proved by retirees to be consistent with the summary plan description, rejects Congressional purpose as well as the views of the Sixth and other circuits.

II. Need Exists for Uniformity Under Single Federal Law

Not merely because a large part of the class of retirees comes from Alpha's plants in the Sixth Circuit and elsewhere outside the Eighth Circuit, but the split in the circuits and the differing

---

[5] The release by DOL's Office of Pension and Welfare Benefit Programs provides in part

> . . . termination is a circumstance which may result in the denial or loss of benefits that a participant or beneficiary might otherwise reasonably expect to be provided under a plan and, therefore, pursuant to section 102 and §§2520.102-2 and 2520.102-3(1), a summary plan description must include information concerning the provisions of the plan which relate to the termination of the plan. In this regard, the Department interprets the provisions of section 102 and §§2520.102-2 and 2520.102.3(1) to require that the summary plan description include, in addition to other relevant information, a summary of any plan provisions governing the rights of the plan sponsor or others to terminate the plan, and the circumstances, if any, under which the plan may be terminated; a summary of any plan provisions governing the benefits, rights and obligations of participants and beneficiaries under the plan on termination of the plan.

The cited regulations are entitled to great deference. *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984).

approaches, makes the issue presented especially compelling for resolution by this Court. Only recently this Court granted review in *Firestone Tire & Rubber Co. v. Bruch, supra,* to resolve a split in the circuits as to approach on benefit eligibility questions, the resolution of which will turn on ERISA intent. ERISA intent is the issue in the instant case and would lead to resolution of the differences in the circuits.

The divergence in the circuits gives reason to Congress' decision to preempt benefit issues to secure a single, uniform approach, even on welfare benefits. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 210-11 (1985) ("the policies that animate §301 . . . require that 'the relationships created by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.' ") Years ago this Court noted that the federal courts fashion substantive law "from the policy of our national labor laws," to be "solved by looking at the policy of the legislation in fashioning a remedy that will effectuate that policy." It called for "judicial inventiveness" to "be determined by the nature of the problem." *Textile Workers v. Lincoln Mills of Alabama,* 353 U.S. 448, 456-57 (1957). This demand for uniformity is just as strong under ERISA.

Thus, this Court recognized in *Pilot Life Ins. Co. v. Dedeaux,* ____ U.S. ____, 107 S.Ct. 1549, 1557-58 (1987) ("*Pilot Life*"), that "Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare plans," heavily stressing the demand for a single federal common law. In *Pilot Life* this Court said that Congress intended there be "uniformity of decisions" so that participants, administrators and fiduciaries all could make *predictions with respect to future actions.* 107 S.Ct. at 1557.

The Eighth Circuit's requirement that participants *prove* that the summary plan description and other objective explanations the participants are given over the years are consistent with the

actual private intent of the drafters as to vesting, A15, allows participants to make no predictions on a matter of major importance to them. *United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987). It defies Congress' determination that participants be armed with sufficient information about their own rights. S.Rep. No. 93-127, 93rd Cong. 1st Sess. 27 (1973), reprinted in 1974 U.S. Code Cong. & Admn. News 4838, 4863.

Lack of uniformity to make predictions exists when circuits disagree on meaning of similar provisions and SPD is unavailable as construction and intent tool

When the formal terms of the agreement are complex and do not expressly state that retirement benefits expire when the labor agreement expires, predictability based on similar formal provisions, varies from circuit to circuit. For example, the Eighth Circuit in the instant case interprets a plan duration provision as supporting a privately held intent the benefit be transitory. A14. Other circuits disagree. *E.g., Hoefel v. Atlas Tack Corp., supra,* 581 F.2d at 5 (earned benefit continues beyond contract expiration regardless of clause that permits plan discontinuation); *Weimer v. Kurz-Kasch, Inc., supra,* 773 F.2d at 675-76 (continuation and duration clauses are directed to cover rights of then active employees, not retirees). *Cf. Ft. Halifax Packing Co. v. Coyne,* 107 S.Ct. 2211, 2216 (1987) (Congress does not view the terms "plan" and "benefits" as synonymous). The Eighth Circuit holds a duration-of-*plan* provision applies to all benefits as well.[6] See A14.

---

[6] The Eighth Circuit thus finds statements made in benefit booklets issued between 1955 and 1959, calling for the Group Insurance *Program* to continue to the date specified for termination of the collective bargaining agreement, as, e.g., A26 ¶14, A27 ¶15, as statements that should be read *as if* stating "all benefits, including those for retirees, are limited to the duration of the agreement." A-3, A-13. Such unequivocal phraseology nowhere appears.

Nor is there uniformity amongst the circuits for prediction when a provision anticipating amendment means the benefit is transitory in the Eighth Circuit,[7] but in the Sixth Circuit a similar clause is found only to suggest anticipation for *later improvements. International Union, UAW v. Cadillac Malleable Iron Co.*, 3 EBC 1369, 1376 (WD Mich. 1982), aff'd 728 F.2d 807, 809 (6th Cir. 1984). Nor can there be uniformity for prediction when the Eighth Circuit gives no meaning to other clauses in the formal agreement between Alpha and the union that specify which benefits end on retirement and which continue after retirement and a provision expressly stating that the agreement specifically tells when benefits terminate if they do, while the Sixth Circuit suggests such clauses have meaning in a four-corners contract approach. *International Union, UAW v. Yard-Man, Inc., supra,* 716 F.2d at 1480.

Nor is there uniformity for prediction from objective manifestations, when in the Ninth Circuit payments of benefits during a strike is meaningful evidence the benefit was not tied into the term of expired collective bargaining agreement, *Bower v. Bunker Hill Corp., supra,* 725 F.2d at 1225, but in the Eighth Circuit payments for benefits during a strike when the labor contract has expired, are meaningless on the issue whether the

---

[7] The Eighth Circuit asserts it is supported by the Third Circuit, A14, *Struble v. New Jersey Brewery Employees Welfare Trust Fund,* 732 F.2d 325, 330 n. 3 (3rd Cir. 1984), in which the labor agreement contained an unequivocal provision expressly allowing the cessation of the employer's obligation occurs if "no longer required by a Collective Bargaining Agreement." *Ibid. No* such similar provision appears in Alpha's agreement. The Third Circuit noted the SPD advised the benefits would terminate if the contributions ended, and found the SPD "relevant." 732 F.2d at 331. The Third Circuit, in conflict with the Eighth Circuit, was at least willing to analyze the evidence to see if "plaintiffs could have reasonably believed that a promise of lifetime benefits had been made." *Ibid.* The Eighth Circuit is unconcerned with the participants' "reasonable beliefs"; its only concern is the drafters' actual intent.

benefit is by law and custom tied into the term of the expired agreement.[8]

The Eighth Circuit views as evidence that the parties intended duration limitation for retirees, a long prior (pre-*Chemical Workers*) 1966 negotiation of a coordination of benefits ("COB") clause when Medicare became effective. After enactment of Medicare practically every plan provided for such coordination, and yet the COB clause has not been viewed as a manifestation of an intent to limit duration in any of the other reported cases. If the Eighth Circuit's acceptance that a Medicare coordination provision means lack of vesting intent, practically every group insurance plan precludes retirees from anticipating lifetime continuation no matter what information is given the retiree.

Review would present limited question; meaning of terms found ambiguous need not necessarily be determined if review is granted

Petitioners do not propose by granting review this Court is required to address the meaning of any particular formal clause in the labor agreement or whether such complex phraseology can be "understood by the average plan participant," for the Eastern District determined in the instant case that the provisions are sufficiently ambiguous as to allow parol evidence.

---

[8] The Eighth Circuit suggests *Bower v. Bunker Hill Corp., supra,* has no applicability if during the strike the employer also continues benefits to active workers. A-13 n. 3. The Ninth Circuit in *Bower,* said "Thus when insurance benefits are provided during a strike, those benefits are probably not tied to the term of a labor-management agreement." 725 F.2d at 1225.

Such ambiguity in the formal clauses is accepted *arguendo* by petitioners in asking this Court for review.[9]

That *ambiguity* finding which the court of appeals did not set aside, allows this Court to limit its consideration to two questions:

> (1) First, whether on a benefit breach claim under ERISA, the Congressionally mandated summary plan description clearly stating coverage will continue "for the remainder of your life," must be given consideration for construction; and
>
> (2) In the presence of such explanatory statements of lifetime coverage in a Congressionally mandated document, before durational limitation can be found should the drafters have the burden of showing by *objective, unequivocal* evidence *timely* revealed to participants and beneficiaries, that retiree benefits were intended to expire with expiration of the union agreement.

Question is presented as to use of Summary Plan Description as interpretive document

The question presented is not necessarily one of *binding* the employer by its summary plan description, albeit on this issue

---

[9] Both the House and Senate Labor Committees' reports on ERISA state

> "Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan's provisions, often cannot comprehend them because of the technicalities and complexities of the language used."

S.Rep. 93-129, at 11, 1 ERISA Leg. Hist. 597 and H.R. Rep. 93-533 at 8, 2 ERISA Leg. Hist. 2355. Thus the ERISA requirement that what is written be "calculated to be understood by the average plan participant." 29 U.S.C. §1022. Petitioners' educational level averaged at the fifth grade.

the Eighth Circuit clearly disagrees with the Eleventh. *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) (in the event of conflict between plan terms and SPD, latter would prevail). In light of the strong ERISA disclosure requirements that workers ought to know and be told clearly,[10] the question petitioners present can be limited to whether federal labor policy under ERISA requires that before the lower court can render a summary plan description unusable for contract interpretation, the drafters have the burden of showing a contrary meaning by *objective, unequivocal* and *timely* revealed evidence.

The Eighth Circuit holds if the summary plan description is inconsistent with the drafters' actual intent as principally derived from their testimony, the summary plan description is meaningless as a tool for construction absent direct evidence that the workers in some manner other than voting for ratification of the labor agreement, *relied* on summary plan description. The Eighth Circuit would not even allow the summary plan description to substitute for what it views as the Sixth Circuit's "gratuitous inference" of intent.

Apart from the necessity of examining Congressional intent behind its information demands a review by this Court would entail, no hornbook law suggests that in a contract breach action, that whether a second document is to be used for contract *construction* should turn on the *reliance* of the other contracting party. There are in commercial contract breach actions an abundance of considerations and rules covering the use of later issued documents for construction, but reliance is *not* included in any of them. See 4 *Williston on Contracts* §629 at 916, §622 at 779-80, §623 at 816 (3rd edn).

---

[10] *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1186 (3rd Cir. 1985) ("it is the employee's right to be informed of his rights, however, rather than the wisdom of the employee's decision concerning these rights that [ERISA] was intended to protect").

Question is presented whether unequivocal, objective evidence is required to allow testimony of prior actual intent

Reason exists for this Court to use review of this case to examine whether unequivocal, objective and timely evidence should be required of the plan drafters before there can be a finding that a never-corrected Congressionally mandated summary plan description is "faulty" and unusable. The Eighth Circuit allows testimony of the drafters to establish actual intent and to give "fault" to the SPD. In other ERISA contract contests the Seventh Circuit stated it will not allow actual intent to dominate, no matter how credible be the testimony on intent. *Robbins v. Lynch,* 836 F.2d 330, 332 (7th Cir. 1988) ("undisclosed intent is not material"). See also *Kemmis v. McGoldrick,* 706 F.2d 993, 996-97 (9th Cir. 1983) (under federal labor law testimony of witnesses as to their understanding as to ambiguous terms held improper; "judicial recognition of such oral statements invites collusion and controversy to the detriment of the employee beneficiaries"). The Eighth Circuit is in direct conflict with these views.

Also in conflict with the Eighth Circuit, the Sixth Circuit stresses "objective manifestations of a party's intent." *International Union, UAW v. Cadillac Malleable Iron Co., supra,* 3 EBC 1369, 1375, aff'd 728 F.2d 807, 809 (6th Cir. 1984). See also *Bower v. Bunker Hill Corp., supra,* 725 F.2d at 1224 ("we look to extrinsic evidence" and not parol evidence). These cases are consistent with hornbook commercial contract law that testimony of what was one's prior actual intent is improper. 4 *Williston on Contracts* §611 at 556, §606 at 375, §612 at 577-78 (3rd edn). The Eighth Circuit disagrees.

If the information purposes of ERISA, 29 U.S.C. §1001(a) and (b), establish or add to a federal labor policy, then there is compelling reason to consider whether the appropriate balance under federal substantive law requires objective, unequivocal and timely evidence before testimony of actual intent can be of-

fered and before the summary plan description can be ignored and called "faulty."

This Court has held in other contexts that a burden falls on the drafters to use unequivocal language if the employer's periodic obligations to fund group insurance benefits is to be limited. *Lewis v. Benedict Coal Corp.*, 361 U.s. 459, 469-70 (1960) (duty to use unequivocal language if the employer's obligations to make contributions to fund retirement benefits were to be excused notwithstanding contract clause expressly conditioning employer's performance under contract on union's not striking). In *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364, 372-74 (1984), this Court similarly imposed an obligation on the drafting parties to use unequivocal language if they intended to impose the contractual grievance procedure on the plan trustees. This Court also recognized in *Schneider,* that the union might at the time of controversy side with the employer for reasons of its own, *ibid,* which is significant in considering whether the objective manifestations must occur before the decision is made to terminate.[11]

Phrasing the issue in only a slightly different way, the First Circuit in *United Steelworkers of America v. Textron, Inc., supra,* 836 F.2d at 9, said that one element for consideration would be whether the employer had *failed* to advise employees of the terminability of their health insurance. (Emphasis supplied) The Ninth Circuit may agree. *Bower v. Bunker Hill Corp., supra,* 725 F.2d at 1225 ("arguably inadequate disclaimers in the Summary Plan Description"). The Eighth Circuit clearly disagrees that any meaning can be drawn from respondents' failure to timely explain terminability. Having rejected as meaningful the explanatory and summary plan

---

[11] It is hornbook contract law that the trier is to look to the construction *objectively* placed on the contract *before* the controversy arises. 4 *Williston on Contracts* §623 at 811-12 (3rd edn).

description statements that drafters gave to the workers that the Eastern District found would lead workers to believe that benefits would continue for the retiree's lifetime, the Eighth Circuit would find the drafters' failure to be unequivocal in their formal language and failure to even mention terminability in the SPD, to be totally irrelevant. It would appear the Eighth Circuit suggests that to impose on the drafters a burden of using unequivocal language or to show other timely, objective, unequivocal evidence of their intent to limit duration, would compel the drafters to prove a negative intent. Petitioners would submit not. It would merely compel drafters to meet Congressional intent behind those information requirements Congress imposed in 1974 in enacting ERISA.

III. Resolution Will Have Broad Economic Impact On Government, on Employers and on Union Members

The number of cases on the issue of the duration/terminability of retiree group insurance benefits is legion. Note 2 supra p. 11. They are not diminishing. With health care costs spiraling this decade more than ever, and with the number of employers continuing to find themselves faced with greater at-home retiree benefit costs with the worker base going overseas or otherwise lost, it must be anticipated that there will be a steady increase in the number of retirement benefits cases filed absent resolution by this Court. The issue is one that will have great economic impact on state and federal government welfare and aid processes, as witness the complaint in intervention filed by the United States of America in this very case.

The issue clearly affects the business community. J. Neelson, *Sick Retirees Could Kill Your Company*, Fortune Magazine 3/2/87 pp. 98-99. That community would likely prefer this Court resolve the split in the circuits by rejecting the Sixth Circuit and require all circuits impose the proof-of-drafters'-actual-intent burden on retirees in the manner of the Eighth Circuit.

The issue also affects the membership growth of unions to whom the Eighth Circuit gives whatever "control" there is, to the retirees' benefit destiny. Under the Eighth Circuit decision retirees are forced to recognize that no matter what their employer and union inform them about duration, never knowing what will be their testimony as to actual intent until after termination is attempted, they had better remain union members and pay full dues even after retirement, all in the hope that the union will bargain each time a continuation-of-benefits provision. Absent that, according to the Eighth Circuit, the benefits expire. The Eighth Circuit decision provides strong inducement for retirees to assume "voluntary" membership and augment organized labor's presently diminished ranks. Such an inducement was thought lost years ago by this Court's decision in *Chemical Workers, supra.*

This issue clearly affects an aging population that is rapidly increasing nationwide. The First Circuit recognized as "general facts"

> (1) most retired union members are not rich, (2) most live on fixed incomes, (3) many will get sick and need medical care, (4) medical care is expensive, (5) medical insurance is, therefore, a necessity, and (6) some retired workers may find it difficult to obtain medical insurance on their own while others can pay for it only out of money that they need for other necessities of life.

United Steelworkers of America v. Textron, Inc., supra, 836 F.2d at 8.

CONCLUSION

This case is appropriate for this Court to now address the questions presented. All disputed facts required for review of the questions presented, have been resolved by the Eastern District's findings. For all the reasons stated above it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

Sheldon Weinhaus
906 Olive Street, Suite 900
St. Louis, MO 63101
(314) 621-8363

Counsel of record for petitioners

LEVIN and WEINHAUS
906 Olive Street, Suite 900
St. Louis, MO 63101

Of Counsel

(2)

87-2022

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT ANDERSON, JR., *et al.*,
Petitioners,

vs.

SLATTERY GROUP, INC., *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SHELDON WEINHAUS
906 Olive Street, Suite 900
St. Louis, Missouri 63101
314/621-8363
Attorney of Record for Petitioners

LEVIN and WEINHAUS
906 Olive Street, Suite 900
St. Louis, Missouri 63101
Of Counsel

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

APPENDIX

Table of Contents

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2483

Robert Anderson, Jr., Louis Bank, Eugene L. Berg, James S. Bartelsmeyer, Howard Brust, Raymond E. Copman, John Crittendon, James L. Davis, Sr., Robert F. DeGroot, Mathew L. DeLarber, Roland E. Doyle, Melvin C. Doyle, Leslie M. Dunard, William J. Ehrenreich, Paul H. Eichelmann, Frank D. Gardner, James Gurley, Victor O. Hoffman, James W. Holman, Sidney J. Holman, William J. Huighe, Richard H. Juergens, Oliver Karg, Jr., Harry W. Kendall, Joseph E. Krejci, Arthur L. Marquardt, Melvin V. Meinz, Leo H. Moll, Oliver D. Oglesby, Delbert Price, Tillman Ratty, Albert L. Reece, John L. Rosener, August H. Rosener Donald R. Rosso, Albert M. Scheig, Harry C. Scurlock, Sr., Leroy C. Seitz, Leroy H. Simmons, William Safford, Eugene L. Turner, Fred A. Walsh, Eugene Weibking, James D. Williams, Charles Zadow, William B. Fischer, Charles M. Gapsch, Carl McCoy Coleman, Steve H. Dugan, Joseph D. Goodwin, Lilburn C. DeGeare, Jack Ratty, Edward A. Moeller, Louis F. Franke, Stephen C. Siebenmorgen, Orville Usher, James P. Carter, Ken Spangenberg, T.B. Whitener, Max W. Scheibe, Chester W. Williams, Thomas N. Arengenbright, Simon Kirn, Walter Lillicrap, Frank Mesplay, Roy W. Morrison, Sr., Adolpha F. Schremp, George F. Winch, Clarence E. Wright, Leonard F. Verable and Donald S. Lillicrap,

Appellants,

v.

Alpha Portland Industries, Inc., formerly known as Alpha Portland Cement Company, Insurance and Health Plan for Hourly Employees, The Equitable Life Assurance Society of the United States,

Appellees,

v.

International Brotherhood of Boilermakers, Cement, Lime, Gypsum & Allied Workers Division of International Boilermakers, Charles F. Fuch, Charles C. Huntbach, (Third Party Defendants Below),

United States of America, (Intervenor Below).

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 15, 1987

Filed: January 13, 1988

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BEAM*, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Plaintiffs appeal from the judgment of the district court[1] in favor of Alpha Portland Industries, Inc. (Alpha) and The Equitable Life Assurance Society of the United States (Equitable) in this case involving the Employee Retirement Income Security Act (ERISA) and the Labor Management Relations Act (LMRA). Plaintiffs are a class of former, now retired, hourly employees of Alpha's cement division. This suit developed from Alpha's decision to terminate all retiree health and life insurance benefits on May 1, 1982 when the existing collective bargaining agreement (CBA) expired. Plaintiffs alleged that the welfare benefits were vested lifetime benefits which could not be terminated. After a four day bench trial the

---

* The Honorable C. Arlen Beam, United States Chief District Judge for the District of Nebraska at the time this case was submitted, has since been confirmed as a Circuit Judge of this court.

[1] The Honorable William C. Hungate, United States District Judge for the Eastern District of Missouri.

district court found that the benefits were terminable because the parties to the CBA intended that the benefits only last for the duration of the CBA. 647 F.Supp. 1109 (E.D.Mo. 1986). For the reasons stated below we affirm.

I. BACKGROUND

In 1946 Alpha unilaterally created a group insurance plan for active hourly employees. In 1948 it extended limited coverage to future retirees. From 1946 through 1955 there were no formal plan documents but there were booklets describing the benefits. The 1948 booklet stated that the plan was to take effect on November 1, 1948 and that Alpha hoped "to continue the Plan indefinitely but reserves the right to change, modify, or discontinue it if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue." In 1950 and 1952 the plan was revised, but each new plan contained the continuation statement found in the 1948 version.

Beginning in 1955, the terms of the plan became subject to bargaining between Alpha and the International Cement, Lime, Gypsum, and Allied Workers Union. The 1955 CBA stated that the "Group Insurance Program currently in effect shall continue in effect for the period" of the agreement. The CBA also stated that it was subject to renewal each year unless either party gave notice sixty days prior to its expiration date. The 1956, 1957, and 1958 CBAs each provided that benefits were limited to the duration of the agreement. Further, the 1956 plan booklet stated that Alpha reserved "the right to change, modify, or discontinue" the plan.

The 1959 through 1963 CBAs contained provisions stating that "the Group Insurance Plan currently in effect shall be amended" as provided. The amendments did not affect retirement benefits and contained no language relating to their duration. However, the duration of the entire agreement was limited to one year. In 1959 a booklet was issued describing the benefits

of the major medical insurance plan. The booklet stated that the group insurance contract between Alpha and The Equitable Life Assurance Society of the United States "may be altered or discontinued." The CBAs covering the period from 1963 to mid-1965 were substantially similar to those covering the previous four year period.

During negotiations over the 1965 CBA, union representatives submitted a proposal that retiree benefits be paid to the spouse and dependents of the retiree after death of the retiree, but Alpha rejected it. Thereafter an agreement was entered into which stated that the plan currently in effect would remain in effect until the effective date of the amendments. One of the amendments stated: "Future retirees' life insurance, increased from $2,000 to $2,500. For future retirees, Company will pay full costs of all group insurance for them and their dependents *until death of retiree*," (Emphasis added). Union negotiators believed that this clause guaranteed insurance benefits for the life of the retiree, but Alpha's negotiators understood the phrase to mean that benefits would not be paid to dependents after the retiree's death.

Beginning in 1967 the CBA existed in the form of a Basic Agreement and was supplemented by Local Agreements. The 1967 Basic Agreement became effective May 1, 1967 and continued until May 1, 1969. On the expiration date the agreement would renew itself for one year unless sixty days written notice was given by either party. The 1967 agreement provided that the plan currently in effect would remain in effect until May 1, 1968, at which time the attached amendments would take effect. The 1969 and 1971 agreements were substantially similar to the 1967 agreement.

Beginning in 1973 the CBAs contained, as an appendix, a separate Insurance and Health Agreement (I & H Agreement) that contained the terms of the plan. Each I & H Agreement was prepard by the Personnel Manager of Alpha's cement divi-

sion, Robert J. Bonstein, and sent to the Union for approval. The 1973, 1975, and 1978 CBAs each provided that the plan in effect at the expiration date of the previous agreement was to be amended as provided in the I & H Agreement. The 1973 I & H Agreement expressly stated:

> This Insurance Agreement shall become effective May 1, 1973, and shall continue in effect until May 1, 1975, during which period neither the Company nor the Union may demand any change in its provisions.
>
> After May 1, 1975, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other party at least sixty (60) days prior to May 1, 1975 (or any subsequent anniversary of the Effective Date of the Collective Bargaining Agreement) of its desire to amend or modify this agreement.

Both the 1975 and 1978 I & H Agreements contained duration clauses identical to the 1973 clause, except that the dates were different — the 1975 agreement was effective until May 1, 1978 and the 1978 agreement was effective until May 1, 1981.

Article I of the 1973, 1975, and 1978 I & H Agreements stated that retiree insurance benefits could be altered:

> Insurance coverages under the Prior Programs not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be amended, modified or supplemented in collective bargaining between the parties.

Also, each agreement provided for coordination of benefits whereby the benefits Alpha paid were reduced by amounts retirees received from other sources such as Medicare.

In 1978 hourly employees were provided a summary plan description (SPD) for the plan. The SPD provided, in part, that "[i]f you retire with 10 or more years of service on or after May 1, 1976, you will continue to receive the Hospital/Surgical and Major Medical portion of plan coverage. *Coverage will continue for the remainder of your life.*" (Emphasis added). The SPD also provided that retirees with 10 or more years of service "will continue to receive $4,000 in Company-sponsored life insurance."

On April 31, 1981 the 1978 CBA with the attached I & H Agreement was due to expire, but the parties agreed to extend the existing terms for an additional year. During this period Alpha was experiencing increasing financial difficulties. Alpha's cement division had an operating loss of almost $17 million in 1980 and 1981. Total losses, including plant closings, exceeded $60 million. In 1981 Alpha closed four of its cement plants and by the end of 1982 all of its cement plants were closed.

On March 29, 1982 Alpha sent letters to all of its retired hourly employees stating that it was cancelling their insurance coverage as of May 1, 1982, following the expiration of the current CBA and I & H Agreement. On May 1 Alpha ceased providing insurance benefits for retirees.

Plaintiffs brought suit in the United States District Court for the Eastern District of Missouri alleging violations of ERISA and the LMRA. The district court dismissed the case, holding that plaintiff's claims are subject to arbitration, 558 F.Supp. 913 (E.D. Mo. 1982). A panel of this court reversed, 727 F.2d 177 (8th Cir. 1984), and upon rehearing en banc the district court again was reversed and the case remanded for trial. *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir.) (*Anderson I*), *cert. denied*, 471 U.S. 1102 (1985).

During the four day bench trial, the district court heard conflicting testimony about whether retiree benefits were vested for

the lifetime of the retiree. Aside from the language in the plan documents, summarized above, the district court also heard other evidence on the issue of intent. For example, union members, including those involved in negotiating the 1975 and 1978 agreements, testified that they had been told by a now deceased Alpha representative that their retirement benefits lasted for life. Plaintiffs introduced into evidence letters drafted by Bonstein and sent to new retirees which stated that "[y]our life insurance will be continued in the amount of ____. * * * Alpha group hospital and surgical insurances for you and your eligible dependents will be continued. * * * Major medical expense benefits will be provided up to a lifetime maximun of ____."

Evidence was produced by Alpha showing that after 1975, the effective date of ERISA, if retiree benefits were to extend beyond the duration of the CBA, it was customary for the plan documents to explicitly state this. Also, International Union President Thomas Miechur (by deposition) and Bonstein testified that under the language they prepared and agreed upon, retiree welfare benefits were not guaranteed beyond the expiration of the CBA.

Miechur's position was corroborated by letters he sent to retirees following Alpha's decision to terminate benefits:

> The termination of the retirees' insurance coverage by the company is a traumatic experience for all retirees. I fully understand the impact the termination of insurance benefits has on retirees, and I wish there was something that could be done to provide continued coverage, but under the circumstances there is nothing that the Union can do. There is nothing in the collective bargaining agreement itself, or in the Insurance and Health Agreement which guarantees retirees' benefits for life, nor is there any language in these agreements that talks about vesting of these benefits, and these benefits will expire of their own force on May 1, 1982.

> Pensions, unlike health and welfare benefits, are paid from an actuarially predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid for by the employer contributions and last only for the life of a collective bargaining agreement.

The district court weighed this and other evidence and concluded that retiree welfare benfits were not vested for life and entered judgment in favor of Alpha. The court further held that Equitable was not a necessary party to the lawsuit and entered judgment in its favor.

II. DISCUSSION

On appeal plaintiffs raise numerous issues which fall into four general categories. They argue that: 1) the district court erroneously concluded that retiree health and life insurance benefits were not vested for the lifetime of the retiree; 2) the district court erroneously deprived them of a jury trial; 3) the district court committed several errors when conducting the proceedings; and 4) the district court erroneously concluded that Equitable is not a necessary party.

A . Duration of Benefits

In 1974 the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (1982), was enacted to "protect interstate commerce and the interests of participants in employee benefit plans" by establishing disclosure and reporting requirements, standards of conduct for plan fiduciaries, and access to federal courts. 29 U.S.C. §1001(b). "Employee benefit plans" are divided into two distinct categories: welfare plans and pension plans. In general, welfare plans are maintained to provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment * * * *" 29 U.S.C. §1002(1). Pension plans, however, "(i) provide[] retirement income to employees, or (ii) result[] in a

deferral of income by employees for periods extending to the termination of covered employment or beyond * * * *" 29 U.S.C. § 1002(2)(A).

Aside from the difference in their purposes, welfare and pension plans also differ in another critical way. While pension plans are subject to ERISA's stringent vesting requirements, 29 U.S.C. § 1053 ("[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age"), welfare plans are specifically exempt from such requirements. 29 U.S.C. § 1051. *See generally Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987).

Since welfare benefits do not automatically vest as a matter of law, *see, e.g., Molnar v. Wibbelt*, 789 F.2d 244, 250 (3rd Cir. 1986), we must determine whether "the parties intended [that] retirees' benefits would be vested and not tied to the agreement which created them." *UFCW Local 105-A v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985). The exemption from ERISA's vesting requirements does not prohibit an employer from extending benefits beyond the expiration of the collective bargaining agreement. Rather, the exemption allows the parties to determine the duration of the welfare benefits. Thus, the issue is "simply one of contract interpretation." *Id.*

Plaintiffs argue that once they showed that retirees were given welfare benefits, Alpha had the burden of showing that the benefits were for a limited duration. Plaintiffs principally rely on the decision of the Sixth Circuit in *International Union, United Auto., Aero, and Agric. Implement Workers of America v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Yard-Man* the court stated that:

> retiree [welfare] benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained.

> *Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.* This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of the agreement itself.

Id. at 1482 (emphasis added).

We disagree with the plaintiffs for several reasons. First, assuming we recognize an inference in favor of vesting, the burden of proof still remains on the plaintiffs. Shortly after *Yard-Man* was decided the Sixth Circuit stated that "there is no legal presumption based on the status of retired employees." *International Union, United Auto., Aero. and Agric. Implement Workers of America v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984). Inferences do not shift the burden of proof.

Second, we disagree with *Yard-Man* to the extent that it recognizes an inference of an intent to vest. Congress explicitly exempted welfare benefits from ERISA's vesting requirements. It, therefore, seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires. The court in *Yard-Man* recognized that no federal labor policy presumptively favors vesting. Because Congress has taken a neutral position on this

issue "traditional rules for contractual interpretation are applied as long as their application is consistant with federal labor policies." *Yard-Man*, 716 F.2d at 1479. We believe that it is not at all inconsistant with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences. Further, our holding today is consistant with previous opinions of this court. For example, in *Morrell*, this court stated that:

> The gist of [plaintiff's] claim is that the employer's oral statement to individual employees of its "policy" became a contract to maintain and improve the plan when the employees thereafter performed service. Yet if that be so, it would equally follow that an employer's announcement of any plan to pay welfare benefits would become a contract to maintain the plan indefinitely upon the performance of service by employees. Congress, however, did not intend that result. Doubtless it is consistent with the intent of Congress for an employer to undertake such an obligation if it elects to do so. We conclude, however, that to accomplish that result, there must be a specific, if not written, expression of the employer's intent to be bound.

830 F.2d at 877. *See also Dubuque Packing*, 756 F.2d at 70 (burden is on plaintiff to prove that benefits are vested).

Proper allocation of the burden of proof in this case leads to the conclusion that the district court correctly held that retiree welfare benefits were intended to last only for the duration of the CBA.

It is axiomatic that when interpreting a contract, or in this case a CBA, we must begin by examining the language of the documents which form the basis of the agreement. *See Yard-Man* 716 F.2d at 1479. "[I]f the contract is deemed ambiguous, then the court may weigh extrinsic circumstances to aid in its construction." *Dubuque Packing*, 756 F.2d at 69. Because the district court considered extrinsic evidence, we will assume the court found the language in the documents ambiguous.

Plaintiffs' argument that retiree welfare benefits were vested falls into two categories: pre-1973 agreements and post-1973 agreements.

1. Pre-1973

Prior to 1973, retiree welfare benefits were provided for by the CBA although the actual terms were contained in group insurance policies. Plaintiffs focus on the language in the 1965 CBA which stated that "[f]or future retirees, Company will pay full costs of all group insurance for them and their dependents until death of retiree." Viewed in a vacuum this language is highly probative of intent to vest benefits, but when viewed in the context of the events surrounding its adoption it is less significant. At trial Alpha produced evidence showing that the phrase reflected Alpha's rejection of a union proposal that retirees' dependents' benefits would be continued beyond the death of the retiree. [2] Further evidence showed that during the term of the 1965 CBA five Alpha local unions agreed to coordination of benefits with Medicare. The agreement applied to persons already retired and thus was consistent with plaintiffs' theories of vesting.

Aside from the phrase "until death" in the 1965 CBA, no credible evidence of intent to vest exists in the pre-1973 period.

---

[2] This construction is not inconsistent with *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986), wherein a district court's interpretation of similar language was overturned on appeal. In *Policy* the agreement provided for the continuation of benefits "for the pensioner and his spouse, if any, during the life of the pensioner at no cost to the pensioner." *Id.* at 616. The district court interpreted the phrase to cut off dependent coverage at the pensioner's death rather than guarantee lifetime benefits to the pensioner. The Sixth Circuit disagreed because the district court's interpretation would have lead to the anomalous result that the spouse would receive benefits at no cost while the pensioner would have to pay. *Id.* The result reached in the present case, however, presents no such problem.

From 1946 through 1955 Alpha "reserve[d] the right to change, modify, or discontinue [the group insurance plan] if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue." The 1956, 1957, and 1958 CBAs limited benefits to the duration of the agreement and the 1956 Plan Booklet stated that Alpha reserved the right to discontinue the plan. The 1959 through 1963 CBAs each had a one year duration and a booklet issued in 1959 stated that the group insurance plan "may be altered or discontinued." The 1967, 1969, and 1971 Basic Agreements also were of limited duration. In short, nothing prior to the adoption of the I & H Agreements proves that vesting was intended. [3]

2. Post-1973

Beginning in 1973 retiree welfare benefits were embodied in I & H Agreements which were appended to the CBA. The relevent portions of these agreements are set forth in the factual statement. The district court held that the agreements reflect an intent to limit benefits to the duration of the then effective agreement because each agreement: 1) states that benefits previously provided would be continued; 2) provides that its terms are subject to amendment, modification, or supplementation at later bargaining sessions; 3) has an explicit duration clause limiting its duration; and 4) contains a coordination of benefits clause which is inconsistant with a theory of vesting. 647 F.Supp. at 1126-27. We agree with each of the district court's conclusions.

---

[3] Plaintiffs note that during two strikes Alpha continued to pay retiree welfare benefits. While payment of benefits during a strike may show that benefits were thought to be vested, *Bower v. Bunker Hill, Co.*, 725 F.2d 1221, 1225 (9th Cir. 1984), the facts in this case do not support such a conclusion. During the 1957 strike, benefits were continued for retirees as well as for all striking employees. Similarly, in 1965 some of the striking employees were also provided benefits during the strike. The fact that Alpha treated retirees and striking employees equally negates any inference of intent to vest retiree benefits.

First, we agree that *Dubuque Packing* is distinguishable. In *Dubuque Packing* the 1973 and 1976 agreements reaffirmed and continued the retiree benefits established in the previous agreements. However, although the 1979 agreement did not contain reaffirmation and continuation language, the company continued paying the benefits of pre-1979 retirees. This court found that the continuation of benefits was evidence that the benefits were vested. In the present case, however, each I & H Agreement provided for continuation of benefits from the previous plan. Were there an intent to vest, continuation language would not be necessary. *See International Union (UAW) v. Roblin Industries*, 561 F.Supp. 288, 298 (W.D. Mich. 1983). [4]

Second, the provision of the I & H Agreement allowing amendment, modification, or supplementation is inconsistent with plaintiffs' argument that benefits were vested for life. *See Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 330 (3rd Cir. 1984).

Third, the specific durational clauses in the I & H Agreements show an intent to limit benefits to the duration of the agreement. It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date. Plaintiffs argue that benefits are non-terminable because the word "terminate" does not appear. However, they cite nothing to support this

---

[4] Plaintiffs erroneously cite *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967), for the proposition that language providing for continuation of prior programs indicates an intent to vest. The case merely states that the word "continue" as used therein was ambiguous and needed to be supplemented by extrinsic evidence.

argument. [5] The question before us is not whether any specific words appear, but whether the parties intended benefits to vest. Intent, or lack thereof, may be proved in more ways than one, and the absence of the word "terminate", while relevant to our inquiry, certainly is not dispositive. *See Struble*, 732 F.2d at 330-31 (benefits expired at end of agreement even though the word "terminate" did not appear in agreement).

Fourth, coordination of benefits is inconsistant with vesting. When interpreting a contract we must not interpret one provision inconsistantly with another. *Yard-Man*, 716 F.2d at 1479-80. The coordination of benefits provision in the I & H Agreements reduces benefits to be paid to all retirees. We agree with the district court that "the Plan cannot be interpreted to provide vested rights for prior retirees in one provision and to take such rights away in another." 647 F.Supp. at 1127.

Plaintiffs also rely on the statement in the 1978 SPD that "[c]overage will continue for the remainder of your life." The district court held that based on the clarity of later I & H Agreements and the conduct of the parties, very little weight would be given to the statement. 647 F.Supp. at 1127. Because the district court's interpretation was based largely on the credibility of the witnesses presented by both parties, and because plaintiffs have not convinced us that the district court erred, we believe that the court correctly held that the 1978 SPD statement is not controlling in light of substantial contra evidence showing no intent to vest benefits.

---

[5] Plaintiffs contend that this court in *Dubuque Packing* demanded that the phrase "terminate retirement benefits" explicitly appear in an agreement before the benefits will be construed as terminable. However, nowhere in the opinion does the phrase "terminate retirement benefits" appear. The closest language — "[t]here is no evidence that the parties agreed to *terminate retirees' benefits*" — falls far short of establishing the bright line test plaintiffs would have us apply in this case. *Dubuque Packing*, 756 F.2d at 69 (emphasis added).

Plaintiffs further argue that they are entitled to recover under the 1978 SPD alone, independent of the CBAs and I & H Agreements. They base their claim on 29 U.S.C. §1022 which provides, in pertinent part:

> (a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.
>
> * * *
>
> (b) The plan description and summary plan description shall contain the following information: * * * circumstances which may result in disqualification, ineligibility, or denial or loss of benefits * * * *

Plaintiffs argue that under the 1978 SPD they are entitled to lifetime benefits because 1) the SPD failed to specify the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits" and 2) the SPD guarantees benefits for life.

This court stated that "[t]o secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary." *Lee v. Union Electric Co.*, 789 F.2d 1303, 1308 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 460 (1986). *See also Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984). Plaintiffs argue that these cases are inapposite because the SPD in the present case is not "faulty." We disagree, because to the extent plaintiffs argue that the SPD provides lifetime benefits, and therefore is inconsistent with the I & H Agreements, it necessarily must be faulty. ERISA states that

the SPD must "apprise [the] participants and beneficiaries of their rights and obligations under the plan * * * *" If, as plaintiffs argue, the SPD fails to do this, it is faulty.

Plaintiffs further argue that they need not show detrimental reliance to recover under the SPD, citing *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir. 1984). In *Monson*, this court stated that "[l]ogically, evidence of detrimental reliance must show that plaintiffs took action, resulting in some detriment, that they would not [otherwise] have taken." *Id.* at 1302. The court further stated that reliance could "be inferred from the defendants' countless representations that the profit sharing program provided a strong incentive for the employees to do extra work and to stay with the company." *Id.* Plaintiffs argue that reliance may also be inferred in the present case. We have reviewed the arguments and briefs of the parties and the record before us and conclude that reliance should not be inferred in this case. Plaintiffs direct us to nothing from which reliance may be inferred. We believe that *Monson* is not controlling in the present case because the facts in *Monson* readily supported an inference of reliance. The plaintiffs in *Monson* were repeatedly told that fifty per cent of the company's profits were to be contributed to the employee profit sharing program and that they could directly increase the contributions by working harder. In the present case, however absent some evidence of reliance, it would be improper to infer that any of the plaintiffs relied to their detriment on the SPD.

Finally, contrary to plaintiffs' assertions this case does not involve breach of fiduciary duties,[6] unauthorzed amendments, or

---

[6] The district court held that plaintiffs did not plead breach of fiduciary duty, 647 F.2d at 1128, and we agree. Further, it would be ludicrous to hold that Alpha breached its fiduciary duties when it discontinued benefits which were no longer required under the applicable agreements. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued"), *cert. denied*, 107 S.Ct. 1893 (1987).

unilateral termination of a benefit plan. It merely involves a decision by Alpha not to renew retiree welfare benefits which by their own terms have expired. The benefits have neither been terminated nor amended; they simply have expired.

B. Jury Trial

Plaintiffs next argue that pursuant to §301 of the National Labor Relations Act, 29 U.S.C. §185, they were entitled to trial before a jury and that under ERISA they are entitled to a jury trial on the separate breach of contract issue. Alpha contends that plaintiffs have no right to a jury trial because their claim is equitable in nature. We need not resolve this dispute because we believe plaintiffs waived any right to a jury trial on the issue of liability. Only if the court found for plaintiffs on the issue of liability would a jury have been required to assess damages. Plaintiffs agreed to a bifurcated trial and that is what they received. Consider the following conversation between the court and plaintiffs' counsel:

> THE COURT: Well, the way the court would see it, *the court tries the case. If there should be no liability, we all go home*. If there is liability, then the court would fashion a remedy as to the part that is equitable and the part that is damages. If he's right in his position, that it's 301 related and it is damages and that there are cases would require — that and that only, on that portion of it, would go to the jury.
>
> PLAINTIFFS' COUNSEL: *That's exactly our position*.

(Emphasis added).

C. Other Errors

Plaintiffs also argue that the trial judge committed numerous errors when conducting the proceedings below. Only a few of the alleged errors merit discussion and of those, none warrant the relief sought by plaintiffs.

For example, plaintiffs argue that the court erred in denying their July 3, 1985 motion to amend their complaint. The decision whether to allow amendment of a complaint is left to the sound discretion of the district court and will be reversed only if that discretion is abused. *Niagra of Wisconsin Paper Corp. v. Paper Industry*, 800 F.2d 742, 749 (8th Cir. 1986). In the present case plaintiffs' motion was filed more than three years after suit was initially filed, ten days before the then effective discovery cut off date, and two months prior to the projected trial date. Under these circumstances, the district court did not abuse its discretion.

Plaintiffs also argue that the district court set an "oppressive thirty-day schedule" for completion of discovery upon remand. Plaintiffs fail to note, however, that they never sought relief from the schedule set by the court and that when Alpha filed a motion for an extention of time they countered with a motion in opposition.

Further, plaintiffs argue that the district court erred in failing to recuse himself. We have reviewed the allegations made by the plaintiffs and have found nothing indicating that the district court was less than impartial.[7]

Finally, we note that the fifty page limit on the length of briefs filed in this court must be followed. Plaintiffs' counsel's use of 189 single-spaced footnotes in his fifty page brief violates the spirit, if not the letter, of Fed. R. App. P.28(g) and 32(a) and 8th Cir. R. 8(e). In all cases where additional space is needed, permission of the court should be requested.

---

[7] Plaintiffs other allegations of error have been considered and have been found to be without merit. Also, our disposition of this case makes it unnecessary for us to decide whether the district court correctly dismissed the Equitable Life Assurance Society of the United States.

III. CONCLUSION

After careful review of the arguments of the parties, we affirm the judgment of the district court. Plaintiffs failed to carry their burden of proof and prove that retiree welfare benefits were intended to last for the life of the retiree. Also, the district court did not err in denying plaintiffs a jury trial or in conducting the proceedings below.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-1413C(3)

Robert Anderson, Jr. et al.,
Plaintiffs,

v.

Alpha Portland Industries, Inc. et al.,
Defendants.

JUDGMENT

Findings of fact and conclusions of law dated this day are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs take nothing by their cause of action, that the action be dismissed on the merits, and that the defendants recover of the plaintiffs defendants' costs of action.

IT IS HEREBY FURTHER ORDERED that the parties' motions for directed verdict be and the same are denied.

Dated this 30th day of September, 1986.

/s/ William C. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-1413C(3)

Robert Anderson, Jr. et al.,
Plaintiffs,

v.

Alpha Portland Industries, Inc. et al.,
Defendants.

MEMORANDUM

This matter is before the Court after a four-day nonjury trial to determine defendants' liability with respect to the merits of class plaintiffs' claims.[1]

Pursuant to the Labor Management Relations Act (LMRA) and the Employee Retirement Income Security Act (ERISA), named plaintiffs, retired hourly employees of defendant Alpha Portland Industries, Inc. (Alpha), in general seek on behalf of themselves and a class relief for defendants' allegedly improper termination of life and health insurance benefits previously provided to Alpha retirees and their dependents pursuant to the defendant Insurance and Health Plan for Hourly Employees, Alpha Portland Cement Company (Plan). Defendant The Equitable Life Assurance Society of the United States (Equitable) provided and participated in the administration of the policies at issue here. Defendants deny liability.

Having carefully considered the record herein, including the pleadings, the parties' joint stipulation of uncontested facts, the

---

[1] The Court does not now have before it the plaintiff-intervenor United States' claims, the third-party claims filed by defendant Alpha and defendant Plan, or plaintiffs' requests for relief. Such matters have been bifurcated for later, separate consideration, if necessary.

relevant exhibits and testimony, and the parties' argument, the Court hereby makes and enters the following findings of fact and conclusions of law.

Findings of Fact

1. Prior to their retirement, named plaintiffs each worked as an hourly employee of the cement division of defendant Alpha Portland Industries, Inc. (Alpha).

2. Defendant Alpha was at all relevant times a corporation and an employer engaged in commerce and in activities affecting commerce. Until 1972, defendant Alpha was known as Alpha Portland Cement Company, and since 1985 it was known as Slattery Group, Inc.

3. In 1946, defendant Alpha unilaterally created the defendant insurance and Health Plan for Hourly Employees, Alpha Portland Cement Company (Plan). The Plan covered only hourly workers and hourly retirees from Alpha's cement plants.

4. Defendant The Equitable Life Assurance Society of the United States (Equitable) participated in the administration of the Plan.

5. Named plaintiffs represent a certified class consisting of:

A. All persons defined as retirees under the terms of Alpha Portland Industries, Inc.'s Insurance and Health Plan for Hourly Employees (Plan), whose benefits were terminated under said Plan by defendants on or after May 1, 1982.

B. All beneficiaries under the terms of the Plan who would have been entitled to receive benefits under the Plan by reason of their relationship to retirees, whose entitlement to benefits from and after May 1, 1982, was terminated by defendants.

C. Kin of deceased retirees and of deceased beneficiaries entitled to benefits under the terms of said Plan by reason

of familial relationship to retirees, where the death occurred on or after May 1, 1982. (This class includes the surviving spouse and if no surviving spouse, the children of the deceased retiree or deceased beneficiary.)

6. At the time of their respective retirements from Alpha, named plaintiffs and members of the first plaintiff subclass were eligible to receive health and life insurance provided to hourly retirees under the terms of the Plan then in effect. When this litigation began, there were approximately 453 retirees covered by the Plan. This total includes retirees from Alpha's cement plaints in St. Louis, Missouri; Orange, Texas; Birmingham, Alabama; Lime Kiln, Maryland, Cementon, New York; Jamesville, New York; Martin's Creek, Pennsylvania; LaSalle, Illinois; and Ironton, Ohio.[2]

7. From 1946 until 1955, Alpha unilaterally continued and modified the Plan. During this period, there were no formal Plan documents but there were booklets describing the benefit programs.

8. The 1946 Plan booklet did not contain provisions directed explicitly to retired employees. No term of duration was set forth in this booklet.

9. As revised in 1948, the Plan booklet stated that after retirement, if the employee was qualified as specified, life insurance under the Plan could continue in one-half the amount provided to working hourly employees. Booklet for Plan Revised November 1, 1948, at pages 8 and 2. The booklet stated the Plan would become effective, if at all, on November 1, 1948. Alpha explicitly stated in the booklet that the company hoped

---

[2] Plaintiffs and defendants stipulated that, for purposes of the liability determination, there are no retirees from Alpha's cement plant at Manheim, West Virginia, and there were none as of May 1, 1982.

> to continue the Plan indefinitely but reserves the right to change, modify, or discontinue it if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue.

Id. at 7 (continuation statement).

10. As revised in 1950, the booklet stated that qualified retirees would "have the privilege of continuing one-half the amount of their Group Life Insurance for which they were insured immediately prior to retirement." Plan Booklet-Revised November 1, 1950, at 9. The booklet also provided that:

> Employees who retire with the consent of the Alpha Company will have the privilege of continuing their Hospitalization and Surgical Insurance for themselves and dependents. However, the Hospital Benefits for each covered person will be limited to a total of 31 days in any calendar year and Surgical Expense Benefits not to exceed one maximum surgical claim in any calendar year.

Id. at 14. This booklet stated the Plan revisions "will become effective November 1, 1950," and had the same "continuation statement" as the 1948 booklet. *Id.* at 8.

11. As revised in 1952, the booklet stated the life insurance benefits provided to hourly employees could continue for hourly employees who retired if they had attained fifteen years of continuous service, rather than the twenty-five years of service required before the 1952 revision. November 1, 1952, Plan Booklet at 8-9. That booklet also contained a hospital and surgical expense benefit provision identical to the one in the 1950 booklet except that hospital benefits for each covered person were

> limited to a total of 31 days and a maximum reimbursement for additional charges not to exceed $100 in any one calendar year and Surgical Expense Benefits may not exceed one maximum surgical claim in any calendar year.

Id. at 13-14. The 1952 booklet stated the revised Plan "will become effective on November 1, 1952;" and had the same continuation statement as the 1948 and 1950 booklets. *Id.* at 7; 3.

12. These booklets did not contain specific eligibility requirements for retired employees, although such requirements were set forth for other employees and their dependents. *See* 1946 Plan Booklet at 4; 1948 Plan Booklet at 6; 1950 Plan Booklet at 7; 1952 Plan Booklet at 6.

The 1946, 1948, 1950, and 1952 booklets stated Equitable underwrote the policies and provided that Equitable would determine the amounts paid for "cutting operations" not listed within the booklets. 1946 Plan Booklet at 1, 9; 1948 Plan Booklet at 2, 12; 1950 Plan Booklet at 4, 12-13; 1952 Plan Booklet at 3, 12.

Each booklet stated the relevant Plan was funded by contributions from the employees and the company. 1946 Plan Booklet at 1, 2, 5; 1948 Booklet at 3, 5, 7; 1950 Plan Booklet at 4, 5, 8; 1952 Plan Booklet at 3, 4, 7. The insured employees received certificates evidencing the insurance and were referred to the "terms and provisions of the Group Insurance contracts" between Equitable and Alpha to resolve questions relating to the Plan. 1946 Plan Booklet at 4, 20; 1948 Plan Booklet at 7, 24; 1950 Plan Booklet at 7, 24; 1952 Plan Booklet at 7, 24.

13. From 1955 until 1982, Alpha, the International Cement, Lime, Gypsum and Allied Workers Union (union), and the union's Alpha locals negotiated concerning the Plan.

14. In 1955, the "safety and welfare" section of the collective bargaining agreements (CBA) between Alpha and its locals stated that the "Group Insurance Program currently in effect shall continue in effect for the period" of the CBA. Each collective bargaining agreement stated its term began when both parties signed it, continued until a date specified (being one year later), "and each year thereafter unless sixty (60) days' notice is given in writing by either party prior to any expiration date."

The "safety and welfare" section of the CBAs for 1956, 1957, and 1958 provided that the "Group Insurance plan agreed upon at the time of signing this agreement shall continue in effect for the period" of each CBA. Each CBA had the same "term of agreement" provision as the 1955 CBAs.

15. The booklet for the Plan revised as of May 1, 1956,

(a) set forth explicit eligibility provisions for "employees," "new employees," "regular employees," and "dependents," 1956 Plan Booklet at 4;

(b) contained a statement that the "increased Benefits became effective on the effective date of your 1956 union contract;"

(c) stated that:

> The Alpha company hopes to continue the Plan indefinitely but reserves the right to change, modify, or discontinue it if future conditions make such action necessary or if reduction of Alpha Company earnings make it impossible to continue, except where continuance is specified by union contract.

Id.;

16. In the "safety and welfare" section of the CBAs effective from 1959 until 1963, there were provisions stating that "the Group Insurance Plan currently in effect shall be amended" by certain specified provisions. These provisions contained no specific reference to retirement benefits. Unlike the earlier CBAs, these CBAs did not say the Plan then in effect "continued" and did not otherwise state there was a fixed duration to any insurance plan deemed to be in effect. The record does not reflect that benefits under the Plan were not disbursed or received between 1959 and 1963. The CBAs between Alpha and its locals for this time period contained the same type of "term of agreement" provision set forth in the earlier CBAs, although the term was for more than one year.

17. In 1959, a booklet regarding "The Alpha Major Medical Expense Insurance Plan" was issued for this new plan, supplementing the hospital and surgical benefits. This insurance plan booklet stated the Plan's benefits (including a "maximum lifetime benefit for any individual [of] $5,000 for expenses incurred for the same or related causes,") "ceases on termination of your active employment with Alpha." *Id.* at 4. This booklet expressly stated that decisions on legal interpretation would be "based upon the terms of the Group Insurance contracts between [Equitable and Alpha], which contracts may be altered or discontinued."

18. As revised for August 1, 1961, the Plan booklet provided as follows:

> Retirement
>
> Upon your retirement with the consent of the company, you may continue:
>
> 1. $2,000 of your group life insurance, if you have completed 15 years of continuous service at the time of retirement, at a monthly cost of $1.00.
>
> 2. Hospital expense and surgical expense insurances on yourself and your dependents. However, in a calendar year, hospital room and board benefits will be limited to a maximum of $13 per day for a total of 60 days and reimbursement for additional charges will be limited to $300. Surgical expense benefits may not exceed $250 in a calendar year. These benefits apply to each insured member of a family separately. Any number of confinements or operations may make up these maximums. Your monthly cost for these hospital expense and surgical expense insurances is:
>
> $ .80 for you, or
>
> 2.24 for you and your wife, or
>
> 2.90 for you, your wife and your children.

1961 Plan Booklet at 14-15. The booklet noted that Alpha paid the full cost of the employees' insurance and most of the dependents' insurance; stated that a certificate containing "complete details of the benefits provided under this plan" would be issued; and stated the "[g]roup insurance for you and your dependents terminates upon termination of your active service except as previously discussed." *Id.* at 1, 13, 15. In its introduction, the booklet also stated "[t]he exact provisions of the plan are contained in the contracts between" Equitable and Alpha.

19. The "safety and welfare" section of the CBAs between Alpha and its union's locals for the period from 1963 until mid-1965 stated that "the Group Insurance Plan currently in effect" would be amended as specified. The noted changes explicitly included enhanced coverage for future retired employees. As with the 1959 through 1963 CBAs, the 1963-1965 CBAs did not say the Plan then in effect "continued," and did not otherwise state there was a fixed duration to any insurance plan deemed to be in effect. The record does not reflect that benefits under the Plan were not disbursed or received between 1963 and 1965. The CBAs for this period also contained the same type of "term of agreement" provision set forth in the CBAs effective from 1959-1961 and 1961-1963.

20. In the booklet for the Plan revised as of August 1, 1963, the only provision expressly related to retired employee benefits stated:

> Upon your retirement with the consent of the company, you may continue:
>
> 1. $2,000 of your group life insurance, if you have completed 15 years of continuous service at the time of retirement, at a monthly cost of $1.00.
>
> 2. Hospital expense, surgical expense and major medical expense insurances on yourself and your dependents.

However, in a calendar year, hospital room and board benefits will be limited to a maximum of $18 per day for a total of 70 days and reimbursement for additional charges will be limited to $360. Surgical expense benefits may not exceed $300 in a calendar year. Major medical expense benefits will be limited to a lifetime maximum of $2500 for all causes. These benefits apply to each insured member of a family separately. All other provisions will continue to apply. Your monthly cost for these expense insurances is:

$ .80 for your, or

2.24 for you and your wife, or

2.90 for your, your wife and your children.

Booklet for August 1, 1963, Plan at 14-15.

21. With respect to hospital, medical, and surgical coverage, the local unions' proposals submitted to Alpha for negotiation in 1965 had suggested "[t]he same hospital, medical and surgical coverage for retired employee and his dependents as is carried by the active employees. This coverage to continue on the spouse and dependents after the retiree's death."

In the CBAs effective from 1965 through 1967, the "safety and welfare" section explicitly provided "[t]he Group Insurance Plan currently in effect will remain in effect until May 1, 1966 and then will be amended as provided in Appendix 'A' attached." In relevant part, Appendix A stated:

I. Future retirees' life insurance, increased from $2,000 to $2,500. For future retirees, Company will pay full costs of all group insurance for them and their dependents until death of retiree.

* * *

M. Hospital, Medical and Surgical benefits for future retirees and their dependents shall be increased by the following.

1. Hospital room charges up to semi-private rate for 120 days; $700 extras; $350 surgical schedule. These benefits to be on a calendar year basis.

2. The present 15 years of continuous service eligibility requirement for retiree insurance coverage reduced to 10 years of continuous service.

No Plan booklet was issued to reflect these changes.

Union negotiators who testified stated that after the 1965-67 CBAs were adopted by Alpha and its union's locals, the union representatives informed their locals or understood from Alpha's representatives that insurance benefits continued for life. Alpha's negotiating representative understood the phrase "until death" in Appendix A of the 1965-67 CBA to mean the benefits would not be paid to dependents after the retiree's death.

22. In 1966, Alpha and its union's locals entered into "memorand[a] of understanding regarding group insurance medicare." In relevant part, these memoranda provided as follows for the coordination of benefits granted through the Plan and through Medicare:

> In the event that an employee, retiree or a dependent thereof, is eligible for benefits under any Federal Program of Hospital, Medical and Surgical care for the aged, the Hospital, Medical and Surgical Benefits under the plan provided by the company shall be payable only to the extent that such benefits under the plan exceed those provided under the Federal Program and there shall be no duplication of benefits.[3]

---

[3] Only the memorandum between Local 43 and Alpha expressly stated that "[c]ompany group insurance plans currently covering employees, retired employees and dependents of employees and retired employees and the plans effective May 1, 1966 shall remain unaltered."

23. Beginning in 1967, Alpha and the union entered into a "Basic Agreement" as the CBA, with "Local [Supplemental] Agreements" amending the Basic Agreement as necessary based upon conditions at the local plant. The preamble to the Basic Agreement for 1967 to 1969 explicitly stated: "[i]n the event of the sale or lease by the Company of a plant covered by this agreement or in the event the Company is taken over by sale, lease assignment, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof." This provision was not in the preamble for the Basic Agreements covering 1969-1971, 1971-1973, 1973-1975, and 1975-1978.

24. The "safety and welfare" section of the 1967-1969 Basic Agreement stated in pertinent part that "[t]he group insurance plan currently in effect will remain in effect until May 1, 1968 and then will be amended as provided in Appendix 'B' attached." Appendix B did not contain any changes expressly related to benefits for retired employees. The section also set forth amendments in the Plan effective May 1, 1967, including a provision that "[a]ny group insurance coverage to retirees shall be continued to employees who retire" at the lower age of 55 as allowed by amendment to the pension plan. This Basic Agreement stated it

> shall become effective May 1, 1967, except as otherwise noted, and shall continue in effect until May 1, 1969, and each year thereafter unless sixty (60) days' notice is given in writing by either party prior to any expiration date.

25. With respect to retirement life insurance and health benefits, the booklet for the Plan as revised for May 1, 1968, provided as follows:

> Upon your retirement with the consent of the company, you may continue:
>
> 1. $2,500 of your group life insurance, if you have completed 10 years of continuous service at the time of retirement.

2. Hospital expense, surgical expense and major medical expense insurances on yourself and your dependents. However, in a calendar year, hospital room and board benefits will be limited to the hospital's regular charge for semi-private accommodations for a total of 120 days and reimbursement for additional charges will be limited to $700. Surgical expense benefits may not exceed $375 in a calendar year. Major medical expense benefits will be limited to a lifetime maximum of $2,500 for all causes. These benefits apply to each insured member of a family separately. All other provisions will continue to apply.

Special Note: If Alpha is reimbursing an individual for Medicare's Medical Insurance, the expense insurances described above will be coordinated with the Medicare Benefits so that there shall be no duplication of benefits.

Booklet for May 1, 1968, Plan at 14-15.

26. In 1969, the union submitted for consideration and negotiation a proposed insurance agreement that included, in relevant part, provisions for life insurance benefits to retired employees, and stated: "in the event of death of the insured from any cause, at any place, and at any time," . . . "[u]pon the death of the Retiree, coverage for his Dependents under the Program shall be continued as though such Retiree was living;" and

The benefits of the Prior Program for Employees, Retirees, and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. Any insurance which as of the date immediately preceding the Effective Date of the Program is being continued during a layoff, leave of absence, illness, injury, disability, or retirement, in accordance with the Prior Program shall be adjusted on the Effective Date to reflect the benefits and coverages of the Program.

* * *

> This Insurance Agreement shall become effective ____, 1969, and shall continue in effect until ____, 1971, during which period neither the Company nor the Union may demand any change in its provisions. After ____, 1971, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to ____, 1971 (or any subsequent anniversary of the Effective Date of the Agreement) of its deisre to amend or modify this agreement.

See union-proposed 1969 Insurance Agreement at 1, 3, 9, 11.

27. The "safety and welfare" section of the Basic Agreement for 1969-1971 stated "[t]he group insurance plan in effect until May 1, 1969, will be amended as provided in Appendix 'A-69' attached." The Appendix set forth the following amendments related to benefits for retired employees:

> Life Insurance for employees retired after May 1, 1969, shall be increased from $2,500 to $3,000.
>
> * * *
>
> Life Insurance for employees retired after May 1, 1970, shall be increased from $3,000 to $3,500.
>
> * * *
>
> The Dental Expense Insurance of any employee shall cease automatically upon the occurrence of . . . the employee's retirement.

There was no provision in the Basic Agreement stating that the Plan in effect would be "continued." The record does not reflect that benefits were not disbursed or received between 1969 and 1971. This Basic Agreement contained the same "term of agreement" provision as the 1967-1969 Basic Agreement, except

this Basic Agreement was effective from May 1, 1969, until May 1, 1971.

28. The booklet for the Plan as revised May 1, 1969, set forth the following provision regarding benefits for retirees:

> Upon your retirement with the consent of the company, you may continue:
>
> 1. $3,000 ($3,500 if you retire after May 1, 1970) of your group life insurance, if you have completed 10 years of continuous service at the time of retirement.
>
> 2. Hospital expense, surgical expense and major medical expense insurances on yourself and your dependents. However, in a calendar year, hospital benefits will be limited to the hospital's regular charge for semi-private care for a total of 120 days. Surgical expense benefits may not exceed $450 in a calendar year. Major medical expense benefits will be limited to a lifetime maximum of $2,500 for all causes. These benefits apply to each insured member of a family separately. All other provisions will continue to apply.
>
> Special Note: If Alpha is reimbursing an individual for Medicare's Medical Insurance, the expense insurances described above will be coordinated with the Medicare Benefits so that there shall be no duplication of benefits.

Booklet for May 1, 1969, plan at 24-25. This was the only provision in this booklet mentioning retirement benefits.

29. In 1971, the union again submitted for consideration a proposed "Insurance and Health Agreement." The proposed agreement contained the following relevant provisions:

> Commencing on and after the Effective Date, the Company will provide for all Bargaining Unit Employees (hereinafter referred to as "Employees" or "Employee") and their Dependents and all Retirees and their

Dependents the Group Insurance Program set out herein. Insurance coverages under the Prior Program not hereinafter provided shall be continued to the extent applicable to Employees and their Dependents and Retirees and their Dependents in accordance with the provisions of the Prior Program as if fully set out herein and as the same may now or hereafter be amended, modified or supplemented in collective bargaining between the parties.

The benefits of the Prior Program for Employees, Retirees, and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. Any insurance which as of the date immediately preceding the Effective Date of the Program is being continued during a layoff, leave of absence, illness, injury, disability, or retirement, in accordance with the Prior Program shall be adjusted on the Effective Date to reflect the benefits and coverages of the Program.

* * *

Life Insurance coverage for each Retiree, including disability retirees age 60 or more who have not elected either Option (2) or Option (3) under Section 2(a) of this Article, and each Employee who becomes totally and permanently disabled (as defined in the Pension Plan) after he attains age 60, shall be in the amount of $10,000 payable in one sum to the beneficiary in the event of death of the insured from any cause, at any place, and at any time.

* * *

Upon the death of a Covered Family Member [defined as an employee, retiree, or dependents thereof], coverage for his Dependents under the Program shall be continued as though such Covered Family Member was living.

* * *

> This Insurance and Health Agreement shall be effective from _____, 19____, to _____, 19____. In the event either party desires to amend, modify or terminate the Agreement such party may give appropriate notice sixty (60) days before the natural expiration date. In the event no such notice is given, the contract shall continue until such time as a sixty (60) day advance notice is given of a desire to amend, modify or terminate. If the action by either party desiring to alter the contract is to amend or modify the contract then all other provisions shall continue in full force and effect, except that the Union shall be permitted to strike in support of its proposed amendments or modifications and the employer, to the extent permitted by law, shall be permitted to lock out in support of its amendments or modifications, the provisions of any other contract between the parties to the contrary notwithstanding.

Union's proposed 1971 insurance agreement at 1, 3, 10, 13.

30. The Report of the Contract Negotiations between Alpha and the union for April 26, 1971, through April 30, 1971, states with respect to Alpha's closed plant at Ironton, that the Ironton group "have already received Medicare premiums and they are still in effect in the future." 1971 Report at 7.

31. The "safety and welfare" section of the Basic Agreement for 1971-1973 provided that "[t]he group insurance plan in effect until May 1, 1971, will be amended as provided in Appendix 'A-71' attached." The only provisions of that appendix explicitly directed to retirees stated:

> The Company will continue to reimburse the cost of Medicare premiums, including any subsequent increase in premiums, for those eligible, active or retired including their spouses as long as the Medicare benefits are coordinated with the Company group insurance plan.

* * *

> An employee who is eligible to retire under the terms of the disability retirement pension shall not be required to retire until he has exhausted his weekly accident and sickness disability benefits (52 weeks).

There was no provision stating that the Plan then existing would "continue." The record does not reflect that benefits were not disbursed or received between 1971 and 1973. The Basic Agreement further provided that upon ratification by the union's locals, the agreement would

> . . . become effective and remain in full force and effect and be binding upon the parties hereto from May 1, 1971 to and including April 30, 1973, and it shall continue in full force and effect thereafter from year to year until either party on or before March 1, of any year, beginning March 1, 1973, gives written notice to the other party of its desire or intention either to alter or modify or to terminate the same. If such notice is given, the parties hereto shall begin negotiations not later than March 31 in such year and this Agreement shall continue in full force and effect until completion and signing of a new agreement, provided, however, that after such negotiations have continued without reaching an Agreement until May 1 in any year, then either party may terminate this Agreement, at any time thereafter upon notice.

32. In the May 1, 1971, Plan booklet the "purpose" section explicitly stated that the "benefits and provisions of the group insurance plan in effect prior to the [listed] dates shall continue. This booklet explains the plan on and after the [listed] dates." Booklet for May 1, 1971, Plan at 3. For retirement benefits, the 1971 Plan booklet explained:

> Upon your retirement with the consent of the company, on or after May 1, 1971, you may continue:
>
> 1. $4,000 of your group life insurance, if you have completed 10 years of continuous service at the time of retirement.

2. Hospital expense, surgical expense and major medical expense insurances on yourself and your dependents. However, in a calendar year, hospital benefits will be limited to the hospital's regular charge for semi-private care for a total of 120 days. Surgical expense benefits may not exceed $495 in a calendar year. Major medical expense benefits will be limited to a lifetime maximum of $3,000 for all causes. These benefits apply to each insured member of a family separately. All other provisions will continue to apply.

Special Note: If Alpha is reimbursing an individual for Medicare's Medical Insurance, the expense insurances described above will be coordinated with the Medicare Benefits so that there shall be no duplication of benefits.

The Company will continue to reimburse the cost of these Medicare premiums, including any subsequent increase in premiums, for those eligible, active or retired including their spouses as long as the Medicare benefits are coordinated with the Company group insurance plan.

Booklet for 1971 Plan at 24-25.

33. The Plan booklets for 1963, 1968, 1969, and 1971 stated (a) the entire cost of the Plan was paid by Alpha; (b) "[t]he group insurance contract is between [Alpha and Equitable]. In accordance with this contract a certificate will be issued to you. This certificate contains complete details of the benefits provided under this plan;" and (c) "[g]roup insurance for you and your dependents terminates upon termination of your active service[,]" except as discussed within the booklet. 1963 Plan Booklet at 1, 13, 15; 1968 Plan Booklet at 1, 14, 15; 1969 Plan Booklet at 3, 23, 25; 1971 Plan Booklet at 3, 23, 25.

34. The Plan booklets issued in 1956, 1961, 1963, 1968, 1969, and 1971 stated that Equitable would determine the amount covered for cutting operations not listed in the Plan. 1956 Plan

Booklet at 10; 1961 Plan Booklet at 7; 1963 Plan Booklet at 7; 1968 Plan Booklet at 7; 1969 Plan Booklet at 9; 1971 Plan Booklet at 9.

35. Beginning in 1973, the collective bargaining agreements (CBA) negotiated by Alpha and the union contained as an appendix a separate Insurance and Health Agreement (Agreement) that contained the terms of the Plan. Copies of the Agreement were distributed to all employees in pocket-sized benefit booklets. Each Agreement was prepared by the Personnel Manager of Alpha's cement division, Robert J. Bonstein, and sent to the union for review and approval before it became effective. The Agreement was based on the proposed insurance agreements previously submitted by the union, as drafted by Thomas Miechur, the international union's president. Mr. Miechur (by deposition) and Mr. Bonstein testified that they understood retiree welfare benefits were not guaranteed beyond the term of the Agreement and could terminate upon the Agreement's expiration. The 1973, 1975, and 1978 Agreements do not specifically mention Equitable.

36. The 1973 CBA stated that "[t]he group insurance plan in effect until April 30, 1973, will be amended as provided in Appendix 'A-73' attached." That Appendix was the Insurance and Health Agreement for 1973. The 1973-1975 CBA provided as its "term of agreement:"

> After ratification by the members of the Local Unions this Agreement shall become effective and remain in full force and effect and be binding upon the parties hereto from May 1, 1973 to and including April 30, 1975, and it shall continue in full force and effect thereafter from year to year until either party on or before March 1, of any year, beginning March 1, 1975, gives written notice to the other party of its desire or intention either to alter or modify or to terminate the same. If such notice is given, the parties hereto shall begin negotiations not later than

March 31 in such year and this Agreement shall continue in full force and effect until completion and signing of a new agreement, provided, however, that after such negotiations have continued without reaching an Agreement until May 1 in any year, then either party may terminate this Agreement, at any time thereafter upon notice.

37. The terms of the 1973 Agreement explicitly referred to retirement benefits in numerous sections:

> Commencing on and after the Effective Date, except as stated otherwise, the Company will provide for . . . all Retirees, retired on or after the Effective Date, and their Dependents the Group Insurance Program set out herein. Insurance coverages under the Prior Programs not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be amended, modified or supplemented in collective bargaining between the parties.
>
> The benefits of the Prior Program for Employees, Retirees and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. . . .
>
> * * *
>
> The Company shall pay all premium costs to finance the Program. No Employee, Retiree, retired on or after the Effective Date, or any Dependent thereof, shall be required to make any contributions or premium payments to the Program.
>
> * * *

[With respect to coordination of benefits, if] a retiree is insured under his present employer's plan, his present employer's plan pays first. . . .

* * *

Life insurance coverage for each Retiree, including disability retirees who have completed 10 or more years of continuous service at the time of retirement and are retired on or after the Effective Date, shall be in the amount of $4,000 payable in one sum to the beneficiary in the event of death of the insured from any cause, at any place, at any time, while insured.

Life Insurance coverage for each Retiree, including disability retirees, retired before the Effective Date, shall continue in the same amount for which he was insured prior to the Effective Date.

* * *

[For Basic Hospital-Surgical-Medical Benefits,] [i]f a female Employee or the wife of a male Employee or Retiree becomes confined in a hospital on account of a pregnancy, the benefit payable for such person shall be in an amount equal to the reasonable and customary charges for which coverge is provided in the preceding paragraphs . . . of this Section subject to an overall maximum of $242.00. The overall maximum of $242.00 does not apply on and after May 1, 1974.

* * *

Basic hospital and surgical benefits will be continued on Retirees who have completed 10 or more years of continuous service at the time of retirement, and their Dependents. However in a calendar year, hospital benefits will be limited to 120 days and surgical benefits will be limited to a maximum of $495 in accordance with schedule #1 attached.

The benefits described in Sections (1) and (2) of this Article VI, which become effective on May 1, 1974, will be continued on Retirees:

(1) retired on and after May 1, 1974 and

(2) who have completed 10 or more years of continous service.

and their Dependents.

* * *

Major Medical Expense coverage for Retirees and their dependents including disability retirees, who have 10 or more years of continuous service at the time of retirement and are retired on or after May 1, 1974, shall be in the amount of $5,000. Major Medical coverage for those retired prior to the Effective Date shall continue in the same amount for which they were insured prior to the Effective Date. There shall be no reinstatement after retirement.

1973 Agreement at 1, 2, 3, 5, 10, 24, and 29. The Agreement also stated that accidental death and dismemberment insurance; sickness and accident (weekly indemnity) benefits; basic diagnostic benefits; and dental care benefits, terminated upon retirement. *Id.* at 7, 8, 25, 33. Furthermore, the 1973 Agreement expressly stated:

> This Insurance Agreement shall become effective May 1, 1973, and shall continue in effect until May 1, 1975, during which period neither the Company nor the Union may demand any change in its provisions.
>
> After May 1, 1975, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to May 1, 1975 (or any subsequent anniversary of the Effective Date

of the Collective Bargaining Agreement) of its desire to amend or modify this Agreement.

Id. at 40-41.

38. The 1975-1978 CBA stated that "[t]he group insurance plan in effect until April 30, 1975 will be amended as provided in Appendix 'A-75' attached." That appendix contained the Insurance and Health Agreement as amended May 1, 1975. The 1975-1978 CBA contained the same "term of agreement" provision as the 1973-1975 CBA, except that the period ran from May 1, 1975, to April 30, 1978, rather than from 1973-1975.

39. The terms of the 1975 Agreement explicitly referred to retirement benefits in several sections:

> Commencing on and after the Effective Date, except as stated otherwise, the Company will provide for all . . . Retirees, retired on or after the Effective Date, and their Dependents the Group Insurance Program set out herein. Insurance coverages under the Prior Programs not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be amended, modified or supplemented in collective bargaining between the parties.
>
> The benefits of the Prior Program for Employees, Retirees and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. . . .
>
> * * *
>
> . . . No employee, Retiree, retired on or after the Effective Date, or any Dependent thereof, shall be required to make any contributions or premium payments to the Program.

* * *

[With respect to coordination of benefits,] [i]f a retiree is insured under his present employer's plan, his present employer's plan pays first.

* * *

Life insurance coverage for each Retiree, including disability retirees who have completed 10 or more years of continuous service at the time of retirement and are retired on or after the Effective Date, shall be in the amount of $4000 payable in one sum to the beneficiary in the event of death of the insured from any cause, at any place, at any time, while insured. Life insurance coverage for each Retiree, including disability retirees, retired before the Effective Date, shall continue in the same amount for which he was insured prior to the Effective Date.

An Employee shall have the same rights and benefits with respect to any portion of his life Insurance terminated due to retirement on pension as though such portion had terminated due to termination of employment.

* * *

Basic hospital and surgical benefits described in Sections 1. and 2. (a) of this Article VI, will be continued on Retirees, who have completed 10 or more years of continuous service at the time of retirement, and their Dependents.

The benefits described in Sections 1. and 2. (b) of this Article VI, which become effective on May 1, 1976, will be continued on Retirees:

(1) retired on and after May 1, 1976 and

(2) who have completed 10 or more years of continuous service.

and their Dependents.

* * *

Major Medical Expense Benefits for Retirees and their dependents including disability retirees, who have 10 or more years of continuous service at the time of retirement shall be in the amount of $5,000. Major Medical coverage for those retired prior to the Effective Date shall continue in the same amount for which they were insured prior to the Effective Date. There shall be no reinstatement after retirement.

Employees retiring on or after May 1, 1976 and their Dependents will have their Major Medical Expense Benefits continued as described in Section 8. (a) above and will be eligible for the ninety percent reimbursement feature effective on such date.

1975 Agreement at 3, 4, 5, 8-9, 24, 29. That Agreement further stated that accidental death and dismemberment insurance; sickness and accident (weekly indemnity) benefits; basic diagnostic benefits; and dental expense benefits, terminated upon retirement. *Id.* at 10, 12, 25, 34.

With respect to its term, the 1975 Agreement provided that:

This Insurance Agreement shall become effective May 1, 1975, and shall continue in effect until May 1, 1978, during which period neither the Company nor the Union may demand any change in its provisions.

After May 1, 1978, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to May 1, 1978 (or any subsequent anniversary of the Effective Date of the Basic Agreement) of its desire to amend or modify this Agreement.

Id. at 46.

40. The 1978-1981 CBA stated that "[t]he group insurance plan in effect until April 30, 1978 will be amended as provided in Appendix 'A-78' attached." That appendix contained the Insurance and Health Agreement as amended May 1, 1978. The 1978-1981 CBA contained the same "term of agreement" provision as the 1973-1975 and 1975-1978 CBAs, except that the relevant time period ran from May 1, 1978, to April 30, 1981.

41. The provisions of the 1978 Agreement included retired employees as follows:

> Commencing on and after the Effective Date, except as stated otherwise, the Company will provide for . . . all Retirees, retired on or after the Effective Date, and their Dependents the Group Insurance Program set out herein. Insurance coverages under the Prior Programs not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be amended, modified or supplemented in collective bargaining between the parties.
>
> The benefits of the Prior Program for Employees, Retirees and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. . . .
>
> * * *
>
> . . . No Employee, Retiree, retired on or after the Effective Date, or any Dependent thereof, shall be required to make any contributions or premium payments to the Program.
>
> * * *

[With respect to coordination of benefits,] [i]f a Retiree is insured under his present employer's plan, his present employer's plan pays first. . . .

* * *

Life insurance coverage for each Retiree, including disability retirees who have completed 10 or more years of continuous service at the time of retirement and are retired on or after the Effective Date, shall be in the amount of $4000 payable in one sum to the beneficiary in the event of death of the insured from any cause, at any place, at any time, while insured. Life insurance coverage for each Retiree, including disability retirees, retired before the Effective Date, shall continue in the same amount for which he was insured prior to the Effective Date.

An Employee shall have the same rights and benefits with respect to any portion of his Life Insurance terminated due to retirement on pension as though such portion had terminated due to termination of employment.

* * *

Basic Hospital and Surgical Benefits described in Sections 1 and 2 of this Article VI, will be continued on Retirees and their dependents including disability retirees:

(1) retired on and after May 1, 1976 and

(2) who have completed 10 or more years of continuous service.

* * *

Major Medical Expense Benefits for Retirees and their dependents including disability retirees:

(1) retired on and after May 1, 1976 and

(2) who have completed 10 or more years of continuous service

> shall be in the amount of $5,000. Major Medical coverage for those retired prior to the Effective Date shall continue in the same amount for which they were insured prior to the Effective Date. There shall be no reinstatement after retirement.

1978 Agreement at 3, 4, 5, 8-9, 16, 21-22. The 1978 Agreement further stated that accidental death and dismemberment insurance; sickness and accident (weekly indemnity) benefits; basic diagnostic benefits; and dental expense benefits, terminated upon retirement. *Id.* at 11, 12, 17, and 26. With respect to its term, the 1978 Agreement provided that:

> This Insurance Agreement shall become effective May 1, 1978, and shall continue in effect until May 1, 1981, during which period neither the Company nor the Union may demand any change in its provisions.
>
> After May 1, 1981, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to May 1, 1981 (or any subsequent anniversary of the Effective Date of the Basic Agreement) of its desire to amend or modify this Agreement.

Id. at 39.

42. The 1973, 1975, and 1978 Agreements defined "Retiree" as "any person who is receiving a pension or disability benefit under the terms and provisions of the Pension Plan." 1973 Agreement at 40; 1975 Agreement at 46; 1978 Agreement at 39.

43. The 1975 and 1978 Agreements also contained an article captioned "Prior Program Benefits." Article XI, 1975 Agreement at 35-38; Article XII, 1978 Agreement at 28-31. In particular, Section 1 of the Articles specified that "[t]he benefits continued on Retirees (and their dependents, as applicable) who retired prior to May 1, 1975 [or 1978] are those which were in ef-

fect at the time the individual retired[.]" 1975 Agreement at 35; 1978 Agreement at 28. Section 2 of the Articles itemizes all such prior benefits by listing the type of benefit, the amount of coverage, the effective dates of each such coverage, and the relevant amount of employment service required for a retiree to qualify for such coverage. 1975 Agreement at 35-38; 1978 Agreement at 28-31. Section 3 of the Articles stated that sickness and accident (weekly indemnity) benefits, medical benefits, and basic diagnostic benefits and dental expense benefits are not continued after retirement. 1975 Agreement at 38; 1978 Agreement at 31.

44. In 1978, Alpha provided hourly employees with a "redbook," containing in relevant part the summary plan description (SPD) for the Plan. With respect to retirement, the Plan's SPD provisions stated:

> [that] [t]he Plan as described in this summary applies to those actively employed or who retire on or after May 1, 1978.
>
> * * *
>
> Converting Your Coverage — When you terminate or retire from the Company, you have 31 days during which you may convert your Company-sponsored life insurance to an individual policy. You will be able to make the conversion without a medical review. Your individual coverage can be for any amount from $500 up to the amount of coverage you had before you terminated.
>
> Retirement Coverage — If you leave the Company due to retirement and have 10 or more years of service you will continue to receive $4,000 in Company-sponsored life insurance.
>
> * * *
>
> Retirement — If you retire with 10 or more years of service on or after May 1, 1976, you will continue to receive the

> Hospital/Surgical and Major Medical portion of plan coverage. Coverage will continue for the remainder of your life. However, the Major Medical lifetime maximum for retirees and their dependents is $5,000. This maximum CANNOT be reinstated. All other health expense coverages stop at retirement.
>
> * * *
>
> Plan Sponsor — . . . all contributions to the Plan are made by Alpha and its retired hourly employees.
>
> * * *
>
> Other Summaries — The insurance and health benefits applicable to retirees who retired prior to May 1, 1976, are described in other Summary Plan Descriptions.

1978 SPD at i, 2, 12, 15, 17.

45. During 1980 and 1981, Alpha's cement division had a multi-million dollar operating loss and multi-million dollars worth of trade payables. Additionally, during recent years, Alpha had not complied with covenants in its loan agreements. Alpha unsuccessfully tried to sell its cement assets and the Slattery subsidiary to help offset the apparent financial crisis. In early 1981, Alpha shut down or sold four of its remaining cement plants.

46. In 1981, by agreement of Alpha and the union, the terms of the 1978 Plan were extended through April 30, 1982.

47. In the fall of 1981, Alpha sought to terminate retiree benefits by an agreement with the union to amend the then-effective 1978 Plan and CBA prior to their expiration dates. In February 1982, there were meetings with union locals at Alpha's two remaining cement plants to discuss such an amendment. One local voted to reject the proposed amendment.

48. At meetings with locals at closing plants, Neil Werkheiser, manager of industrial relations, informed union

representatives there was little likelihood the insurance benefits would continue due to the financial problems, and that retirees may want to form common groups with which to obtain insurance.

49. On March 29, 1982, Alpha sent a letter to all Alpha hourly retirees notifying them that Alpha was cancelling their insurance coverage effective May 1, 1982. Enclosed with each letter was a conversion form to be used in the event anyone desired to convert the health coverage to an individual policy with Equitable.

50. In response to retirees' inquiries, Thomas Miechur sent letters stating in relevant part:

> The termination of the retirees' insurance coverage by the company is a traumatic experience for all retirees. I fully understand the impact the termination of insurance benefits has on retirees, and I wish there was something that could be done to provide continued coverage, but under the circumstances there is nothing that the Union can do. There is nothing in the collective bargaining agreement itself, or in the Insurance and Health Agreement which guarantees retirees' benefits for life, nor is there any language in these agreements that talks about vesting of these benefits, and these benefits will expire of their own force on May 1, 1982.
>
> Pensions, unlike health and welfare benefits, are paid from an actuarially predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid for by the employer contributions and last only for the life of a collective bargaining agreement.

51. On or about May 1, 1982, Alpha ceased providing, under the Plan or otherwise, life insurance or health benefits to retirees and their covered family members for any period from and after may 1, 1982.

52. On April 30, 1982, the Plan and CBA then in effect expired.

53. On May 28, 1982, Alpha, the international, and the local at Lime Kiln executed a Memorandum of Agreement which expressly stated that the terms of the 1978 Basic Agreement, "excluding insurance coverage for all retirees," would be continued.

54. During strikes in 1957 and 1965, insurance coverage continued for retired employees.

55. During "hiatus" periods, when one contract expired and Alpha and the union had not yet entered into a new contract, Alpha continued to provide insurance benefits under the terms of the expired contract, purportedly based on agreements that the expired contract's terms would continue in force.

56. In recent years, including late 1981, Alpha sent retirees a letter describing benefits, and stating in relevant part:

> Your life insurance will be continued in the amount of $4,000. The balance of your life insurance will be continued until 31 days from your retirement date. Until then, you may convert it to an individual policy without the necessity of a physical examination. Application may be made by completing the enclosed Notice of Conversion Privilege form. Alpha group hospital and surgical insurances for you and your eligible dependents will be continued. Hospitalization benefits will be limited to the hospital's regular charge for semi-private care for a total of 365 days. Surgical benefits will be paid on a regular and customary basis. Major medical expense benefits will be provided up to a lifetime maximum of $5,000. These maximums apply to you and your eligible dependents separately. Our plan does not permit continuance of weekly indemnity, basic diagnostic expense and dental expense benefits. When an individual attains age 65 (in some cases

sooner where a disabled individual is entitled to monthly cash benefits under the Social Security Program), he (or she) is eligible for Social Security's Medicare Program. The hospital, surgical and major medical benefits described above will be reduced by any benefits payable by Medicare. We strongly urge that you subscribe to the voluntary portion of Medicare; that is the part that costs $11.00 per month. This part of Medicare is also used as an offset against the Alpha benefits. Therefore, it is important that you and your spouse subscribe for the full Medicare Program when eligible. Alpha will reimburse you for the $11.00 cost, upon receipt of a copy of your Medicare card. Reimbursement will be included in your pension check.

57. There was conflicting testimony regarding whether or not Alpha's representatives orally told employees that their insurance benefits continued "for life" or "until death" of the employees. Union members, including those involved in negotiating the 1975 and 1978 Agreements, testified that a now-deceased company representative made such statements. The details of the circumstances of such statements or conversations were not recalled by the witnesses. Company representatives testified they had not personally made or heard such statements.

58. Mr. John Hickey, an employees benefit consultant for Kwasha Lipton (the company that prepared the 1978 SPD for Alpha), testified as an expert witness for Alpha and the Plan. Mr. Hickey noted it was not a customary practice in the industry either to put aside money for future retiree claims under health and welfare benefit plans or to recognize future claims as a liability on corporate books. Mr. Hickey also acknowledged that after 1975, the effective date of ERISA, it was customary practice to state explicitly in the relevant documents that retiree benefits were payable beyond the term of a collective bargaining agreement, where such payments were intended. Mr. Hickey further noted that during the late 1970s, it would have been a

good practice to state expressly how plant closings, etc., might affect retiree health and life insurance benefits, but such was not the industry practice. During cross-examination, Mr. Hickey acknowledged he would have drafted the 1978 SPD differently.

59. In 1974, Alpha became self-insured with respect to benefits for Medical and health care.

60. As amended, the 1978 Plan provided life insurance, accidental death and dismemberment insurance, and sickness and accident insurance benefits through group insurance policies issued to Alpha by Equitable. Hospital, surgical, medical, basic diagnostic, major medical and dental benefits were provided through an Administration Agreement between Alpha and Equitable. Equitable's involvement with Alpha's group health insurance was that of an agent to Alpha. Pursuant to the terms of a written plan, Equitable processed claims and made disbursements through the Administration Agreement by means of a special account funded periodically by Alpha in an amount sufficient to cover current health care costs. Under the Agreement, Alpha was to determine the eligibility of the claimants and to review Equitable's initial determinations respecting payment of benefits.

61. By the end of 1982, all of Alpha's cement plants were closed.

Conclusions of Law

1. This Court has jurisdiction over this matter pursuant to 29 U.S.C. § 1132(f) and 29 U.S.C. § 185(a).

2. If the retirees' life and health insurance are vested benefits, then the benefits may not be terminated without the retirees' consent. *See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971). Unlike pension benefits, health and life insurance benefits do not vest as a matter of law. *See Molnar v. Wibbelt*, 789 F.2d 244, 250

(3d Cir. 1986); *compare* 29 U.S.C. § 1053 (each pension plan shall provide employee's right to benefit is nonforfeitable upon attainment of normal retirement age) *with* 29 U.S.C. § 1051(1)(excluding employee welfare benefit plan from such requirement). In practical terms, there is merit to such a distinction. With some degree of accuracy, the need for funds for and the extent of potential claims against a pension plan may be determined. For example, the length of employment and the employee's salary are determinable. This is not true of health and life insurance benefits. The funding needs of a health insurance plan are more difficult to estimate because one insured individual, in comparison to another insured individual, may have a larger number of claims or a claim for more costly service or no claims at all. In the case of life insurance, there is a certainty the insured will die but an uncertainty as to when the death will occur. Providing this coverage then presents the worst of both worlds.

3. If the life and health insurance benefits are unambiguously limited to the term of the relevant agreement, then the benefits are not vested. *See Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984). Benefits may, however, outlast the agreement under which they arose if the parties so intended. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *District 29 United Mine Workers of America v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *Food & Commercial Workers Local 150A v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985).

4. Thus, the issue is one of contract interpretation, *Royal Coal Co., supra*, 768 F.2d at 590; and, if necessary, a consideration of the relevant extrinsic evidence and the parties' course of dealing, *Dubuque Packing Co., supra*, 756 F.2d at 69, 70. *See International Union, UAW v. Yard Man, Inc.*, 716 F.2d 1476, 1479-80 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

5. Plaintiffs have the burden "to show that the parties intended retirees' benefits would be vested and not tied to the agreement which created them." *Dubuque Packing Co., supra*, 756 F.2d at 70.

6. Plaintiffs contend the 1978 Plan, as extended, clearly provides retirees' lifetime benefits. Plaintiffs urge language explicitly continuing prior programs is not language limiting the benefits to the duration of the agreement, but is language assuring that prior benefits would continue. Plaintiffs also urge: (a) the "until death" language of the 1965 Basic Agreement appendix, effective in 1966, was never altered by subsequent Agreements or the parties' conduct; (b) the "term of agreement" provisions in the Agreements demonstrate the parties' intent to improve, not terminate, the Plan, particularly in light of explicit statements in the Plan that certain benefits "terminate" upon retirement; and (c) through letters, the 1978 SPD, and oral representations, Alpha advised retirees they would receive benefits for life. Plaintiffs direct the Court's attention also to Alpha'a past continuation of benefits for retirees during strikes by active employees, during hiatus periods, and under former terms of the Plan even when early Plan booklets or CBAs failed explicitly to state that former plan provisions continued.

Alpha defendants counter that the 1973, 1975, and 1978 Plans' explicit reaffirmation of the terms of earlier Plans and the Plans' express "term of agreement" provisions indicate an intent that the benefits were tied to the term of the relevant Plan. Moreover, these defendants urge none of the Plans specify that the benefits were vested or lasted either "for life" or "until death." Alpha defendants interpret the "until death" provision in the Plan effective in 1966 as simply a provision rejecting the union's demand that coverage of the retiree's dependents continue after the retiree's death. Alpha defendants urge that the coordination of benefits provisions, first agreed upon in 1966, actually reduced payments made by Alpha and received by class members, yet no one then urged such benefits could not be reduced because they were vested or otherwise received for life.

7. The language of the Insurance and Health Agreements collectively bargained by Alpha and the union beginning in 1973

reflected the intent of the parties to limit retiree coverage for persons covered by those agreements to the term of the currently effective Agreement:

(a) The Agreement specifically reaffirmed benefits of past retirees and earlier Plans stating that benefits previously provided would "continue" or "be continued" under the current agreement. Moreover the 1975 and 1978 Agreements each contained an article specifying the prior benefits that continued. *Dubuque Packing Co.* is factually distinguishable. *Dubuque Packing Co., supra*, 756 F.2d at 69-70. In that case, the Eighth Circuit determined that the parties intended benefits to continue beyond the agreement's terms. In particular, the Eighth Circuit found that, unlike prior agreements, the most recent agreement did not contain provisions extending benefits to employees who retired before the agreement's effective date and there was no explanation for the omission. *Id.* at 69. Here, the clear inclusion of provisions reiterating the continuation of prior benefits and earlier Plan programs persuades the Court that *Dubuque Packing Co.* does not require a finding for plaintiffs.

(b) The Agreements, rather than providing that retiree benefits are fixed forever, provided for continuation of "insurance coverages under the Prior Programs . . . as the same may now or hereafter be amended, modified or supplemented in collective bargaining between the parties." This provision for changes is not consistant with a conclusion that the benefits would continue beyond the Agreement's expiration date. *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 330 (3rd Cir. 1984).

(c) The Agreements contained a duration clause explicitly limiting their duration. Here, an in *International Union (UAW) v. Roblin Industries*, 561 F.Supp. at 288, 298 (W.D.Mich. 1983), a provision limiting the period for which plan benefits would be "continued" is a clear indication that the benefits were provided only for the "effective" term of the agreement. *See also Royal Coal Co., supra*, 735 F.2d at 126; *Struble, supra*

732 F.2d at 330. The inclusion of such language also makes this present case different from the cases upon which plaintiffs rely. *See Roblin Industries, supra*, 561 F.Supp. at 298-99.

(d) The coordination of benefits provision in the Agreements, which reduced benefits payable by Alpha to those already retired, is inconsistant with an interpretation that retiree welfare benefits were vested. This coordination provision applied to all retirees, not just to those retiring after the effective date of the Memorandum of Understanding. Because separate provisions of the contract must be interpreted in such a way as to render them consistant if at all possible, *e.g., Yard Man, Inc., supra*, 716 F.2d at 1479-80, the Plan cannot be interpreted to provide vested rights for prior retirees in one provision and to take such rights away in another.

8. Moreover, the parties' conduct in the face of Alpha's plant closings evince the parties' intention that retiree benefits did not continue beyond the expiration date of each Agreement. Alpha sought an agreement in 1981 that would terminate retiree benefits; at least one of the remaining locals voted on that proposed amendment in early 1982; and, after the extended 1978 Plan expired, the remaining local and Alpha agreed that all agreed upon provisions, except retirees' benefits, would be extended.

9. The Court is troubled by terms in the Summary Plan Description, in letters to retirees, and in alleged oral statements to Alpha's employees indicating that insurance benefits would continue for life. Alpha urges that (a) this language is limiting, *e.g.*, it limits benefits granted to retirees' dependents; and (b) that such language indicated Alpha's expectation to provide retirees with benefits for life based on an expectation Alpha would continue producing cement and entering into CBAs providing for retiree benefits. Based on the clarity of the most recent health and insurance agreements in providing language reaffirming earlier Agreement provisions and retirement benefits and in providing restricted duration provisions, and on

the parties' conduct in 1981 and 1982, the Court does not give great weight to such phrases under the circumstances presented here.

10. The Court is also not persuaded by plaintiffs' argument that lifetime benefits are granted by the phrase "until death," found in the 1965 CBA Appendix. This is the first and only time the phrase appeared in the parties' twenty-five year history of negotiating for retirement insurance benefits. The fact that this very clear phrase was not used again implies that the change, if any, provided by it was the subject of bargaining. While the Court concurs with defendant Alpha's position that the "until death" phrase probably signified a direct rejection of the union's submitted proposal to continue dependent benefits after a retiree's death, at the same time it implies that those benefits would continue through the retiree's lifetime, and thus, as plaintiffs contend, beyond the Agreement's terms. *Cf. Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614-15, 616 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 1202 (1986). In light of subsequent Agreements' provisions and the parties' later conduct, however, the Court finds this unique phrase is not significant for purposes of construing the more recent Agreements.

11. Plaintiffs' efforts to characterize Alpha defendants' liability in terms of breach of fiduciary duty, *see* 29 U.S.C. §§1104 and 1106, or in terms of nondisclosure of benefits at the end of the contract, *see* 29 U.S.C. §1102, are not persuasive and will not now be considered because plaintiffs did not plead these causes of action and they were not tried by consent.

12. Plaintiffs joined Equitable in these proceedings as a "party in interest," defined in §3(14)(B) of ERISA, 29 U.S.C. §1002(14)(B), as including persons providing services to the Plan, and as a necessary party under Rule 19 of the Federal Rules of Civil Procedure. However, the fact that one may have been a "party in interest," as that term is used in ERISA, does not alone make one a necessary party in civil actions to enforce rights under the Act. *Boyer v. J.A. Majors Co. v. Employee*

Profit Sharing Plan, 481 F.Supp. 454, 458(N.D. Ga. 1979). Plaintiffs also contend that Equitable is a fiduciary as that term is defined in ERISA, 29 U.S.C. §1002(21). However, Equitable's payment of health care claims pursuant to the provisions of the Plan from funds provided periodically by Alpha under the Administration Agreement does not clothe Equitable with discretionary authority over management of Plan assets or over the administration of the Plan to such an extent that Equitable's role was that of a fiduciary. *Austin v. General American Life Insurance Co.*, 498 F.Supp. 844, 846 (N.D. Ala. 1980)(no claim under ERISA against mere insurer); *cf. Chicago Board of Options Exchange v. Connecticut General Life Insurance Co.*, 713 F.2d 254, 259 (7th Cir. 1983)(liability to amend annuity contract may render insurance company a fiduciary); *Wolfe v. J.C. Penney Co., Inc.*, 710 F.2d 388, 394 (7th Cir. 1983). Equitable had no discretion to pay or decline a claim. No one contends, nor is there evidence to suggest, that Equitable had any role, discretionary or otherwise, in Alpha's decision to terminate the Plan.

Accordingly, judgment will be entered in favor of defendants and against plaintiffs. *See District 29, UMW v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *Struble, suprs*, 732 F.2d at 330-31; *Turner v. Local Union No. 302, Int'l Bro. of Teamsters, Chauffers, Warehousemen & Helpers of America*, 604 F.2d 1219, 1222-26 (9th Cir. 1979). The parties' motions for directed verdict will be denied.

Dated this 30th day of September, 1986.

/s/ William C. Hungate
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2483EM

Robert Anderson, Jr., et al,
Appellants,

vs.

Alpha Portland Industries, Inc., etc., et al.
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Appellants' petition for rehearing by the panel is also denied.

March 14, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

TEXT OF STATUTES CITED

29 U.S.C. § 185. Suites by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

SUBCHAPTER I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle A—General Provisions

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as effecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee

organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; tha owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for

appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1)

of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 U.S.C. § 1132. Civil enforcement

(a) Persons empoered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

APPENDIX E

LIST OF PETITIONERS

Robert Anderson, Jr.
Louis Bank
Eugene L. Berg
James S. Bartelsmeyer
Howard Brust
Raymond E. Copman
John Crittendon
James L. Davis, Sr.
Robert F. DeGroot
Mathew L. DeLarber
Roland E. Doyle
Melvin C. Doyle
Leslie M. Dunard
William J. Ehrenreich
Frank D. Gardner
James Gurley, dec'd
Victor O. Hoffmann
James W. Holman
Sidney J. Holman
William j. Huighe
Richard H. Juergens
Oliver Karg, Jr.
Harry W. Kendall
Joseph E. Krejci
Arthur L. Marquardt
Melvin V. Meinz
Leo H. Moll
Oliver D. Oglesby
Delbert Price
Tillman Ratty
Albert L. Reece
John L. Rosener
August H. Rosener
Donald R. Rosso
Albert M. Scheig
Harry C. Scurlock, Sr.
Leroy C. Seitz
Leroy H. Simmons
William Stafford
Eugene L. Turner
Fred A. Walsh
Eugene Weibking
James D. Williams
Charles Zadow
William B. Fischer
Charles M. Gapsch
Carl McCoy Coleman, dec'd
Steve H. Dugan
Lilburn C. DeGeare, dec'd
Jack Ratty
Edward A. Moeller
Louis F. Franke, dec'd
Stephen C. Siebenmorgen
Orville Usher
James P. Carter
Ken Spangenberg
T. B. Whitener
Max W. Scheibe, dec'd
Chester W. Williams
Thomas M. Argenbright, dec'd
Simon Kirn
Walter Lillicrap
Frank Mesplay
Roy W. Morrison, Sr.
Adolph F. Schremp
George F. Winch
Clarence E. Wright
Leonard F. Verble
Donald S. Lillicrap, dec'd

(3)

No. 87-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT ANDERSON, JR., *et al.*,
Petitioners,

v.

SLATTERY GROUP, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

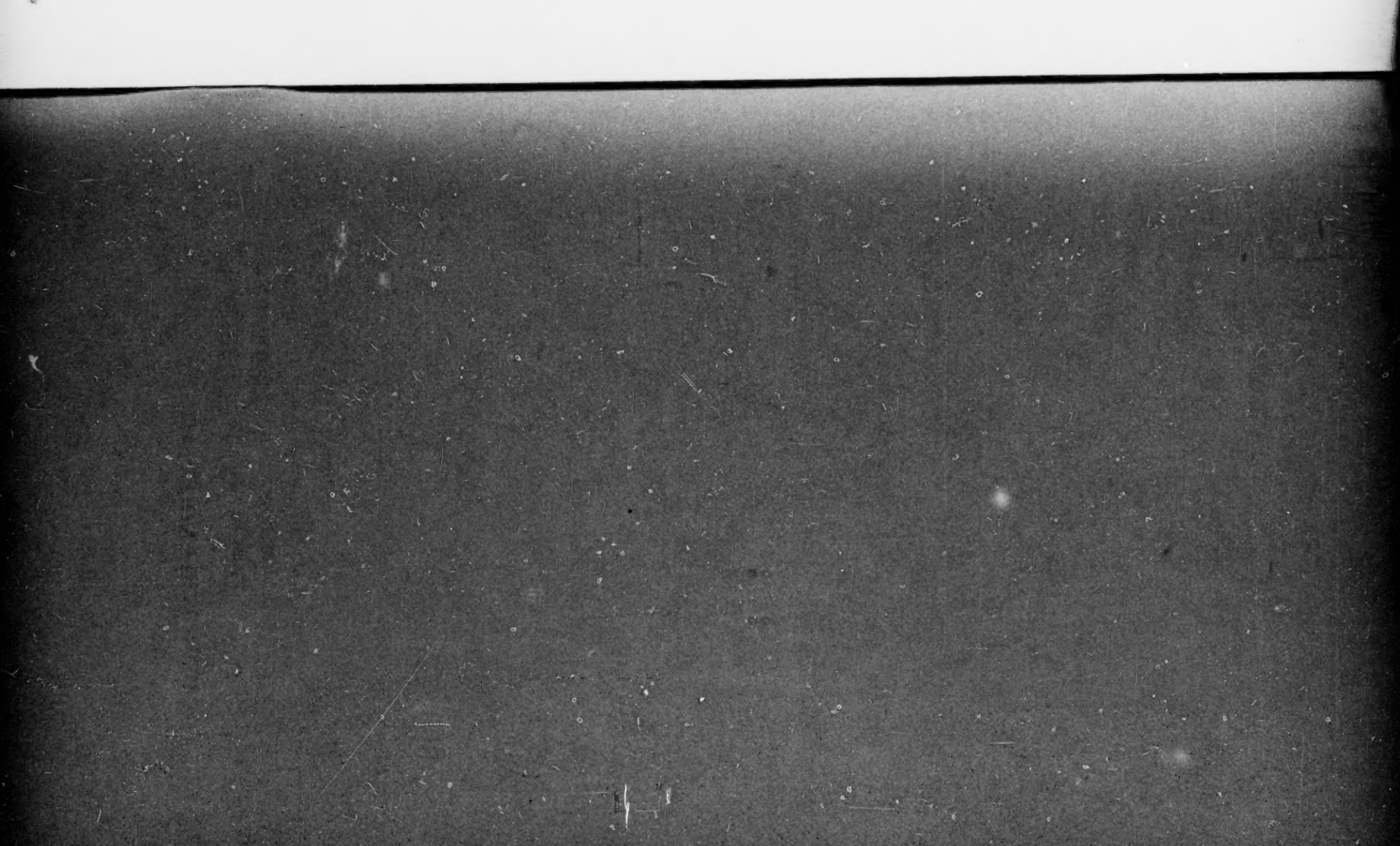
RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL G. BIGGERS
(Counsel of Record)
GEORGE S. HECKER
500 N. Broadway
St. Louis, Missouri 63102

Attorneys for Respondent
Slattery Group, Inc.

BRYAN, CAVE, MCPHEETERS & MCROBERTS
Of Counsel

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477



QUESTION PRESENTED

Should this Court review by writ of certiorari a decision based on a distinctive contractual arrangement and on findings made by two lower courts about the terms of that arrangement and the conduct of the parties?

PARTIES TO THE PROCEEDING

The statement in the Petition that the United States intervened in the district court to assert an interest similar to petitioners is misleading. The United States intervened on behalf of the Veterans Administration solely to recover from respondent Slattery Group, Inc., the costs of medical expenses incurred by the Veterans Administration in treating a few class members. This claim was based on the theory that if those persons were entitled to medical benefits from respondent, then their expenses should have been paid with those benefits. The United States did not appear, much less participate, either at trial or in any aspect of the appeal to the Eighth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Other Authorities:

No. 87-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT ANDERSON, JR., *et al.*,
Petitioners,

v.

SLATTERY GROUP, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Slattery Group, Inc., sued below under its former name, Alpha Portland Industries, Inc. ("Alpha"), respectfully prays that this Petition for a Writ of Certiorari be denied.[1/] The two theoretical questions raised by the Petition are abstract and conjectural in this case because they are not actually framed by the facts established at trial and found by the lower courts. Accordingly, neither question should be reviewed by this Court. Furthermore, there is no genuine issue

---

[1] Pursuant to Rule 28.1 of this Court, we hereby state that this respondent has no parent company or affiliate and no subsidiaries except wholly owned subsidiaries.

of "uniformity" here. As reflected by our restatement of the question presented, the real issue in this case is dependent on the unique facts and evidence of record and turns on evaluations of the credibility and the weight given to the evidence by the lower courts rather than upon any fundamental legal or policy issue. Such matters are simply not the stuff of which this Court's docket is composed.

STATEMENT OF THE CASE

This case involves Alpha's action in discontinuing payment of certain "welfare" benefits (life insurance and health benefits) to a class of hourly retired workers upon the expiration of a collective bargaining agreement with the International Cement, Lime, Gypsum and Allied Workers Union. Although petitioners repeatedly use general terms such as "Retiree benefits" or "retirement benefits" and rely on a number of pension cases, this case has nothing to do with pensions; all pensions for these retired workers continued after the expiration of the bargaining agreement and are not affected by this case.

The trial of this case involved many disputed fact issues, with some direct contradictions in the evidence and many differences over the proper inferences to be drawn from that evidence. Petitioners' Statement of the Case totally distorts the record by omitting the evidence favorable to Alpha and disregarding the actual findings of the lower courts. Both the district court and the Court of Appeals for the Eighth Circuit generally adopted respondents' evidence and the inferences arising therefrom rather than the factual propositions advanced by petitioners. A comparison of the statement of the underlying facts on pages 4 and 5 of the Petition with the facts as found by the lower courts reveals that petitioners are now presenting a version of the evidence that has been rejected at each stage of this case.

The key facts that emerge from the lower courts' findings are clear. At the time any class member retired, his welfare benefits were provided by documents whose terms and duration were

the subject of collective bargaining with the Union (which then represented him as an active employee and union member). Each such agreement effective after 1973 (a) had a limited duration and expired in its entirety, (b) contained absolutely no statement that retiree welfare benefits lasted beyond its expiration, (c) specifically renewed welfare benefits for persons retired before it became effective, and (d) specifically provided that retiree welfare benefits could be changed. Indeed, each agreement reduced benefits for some prior retirees through its coordination of benefits provision. Appendix to Petition for a Writ of Certiorari ("App.") 4-5, 13.[2/]

Each pre-1973 agreement likewise had limited duration and made no commitment to lifetime benefits. Although petitioners state that "no specific reference to durational limits for those retirement benefits appeared" prior to 1965, the Court of Appeals correctly summarized a variety of provisions in collective bargaining agreements, plan booklets and insurance policies which indicated that retiree benefits were not guaranteed for life. *Compare* Pet. 4 *with* App. 3-4. Although petitioners say that "Alpha offered no testimony from any of its 1965 benefits negotiators," both lower courts found that there was such testimony. *Compare* Pet. 4 *with* App. 4, 31.

---

[2] Although petitioners make bold statements of "fact" about the universality of provisions coordinating benefits with Medicare (Pet. 9, 19), there was no such evidence. More importantly, petitioners ignore the key point that both lower courts correctly emphasized — beginning in 1966 for some plants and in 1973 for all plants, Alpha and the Union agreed to a form of coordination of benefits which reduced the amounts that workers who were ***already retired*** would receive from Alpha. App. 12, 15, 59. This reduction of benefits payable to existing retirees, a fact not addressed in any other reported decision, was properly regarded as evidence that the parties did not think at any time that they had provided a lifetime guarantee to retirees. In this regard, we also note that there is a misprint on page 12 of petitioners' Appendix as initially filed; the Court of Appeals found that the 1966 reduction was *inconsistent* with plaintiffs' theories.

In addition to the text of the documents, the conduct of the Union and Alpha also demonstrated that they did not intend to provide lifetime benefits. When Alpha announced the discontinuation of retiree welfare benefits in 1982, the Union wrote various retirees expressly telling them that the benefits were limited in duration and that Alpha had a "perfect right" to discontinue them. App. 7-8; ***see also*** Exhibits B-12 and E-14. The Union took other actions consistent with Alpha's position and never claimed that the company was obligated to pay benefits for life. ***See*** App. 51-52; Tr. 2:237-38; 3:145-46. Indeed, when Alpha indicated in 1981 meetings held at the plants that the benefits would probably not be continued for long, no one told Alpha that it was obligated to provide benefits for life.

Petitioners selectively rely on the writings of the International Union President when it suits their purposes (Pet. 4), but they seek to have this Court make a credibility determination and discount both his direct testimony that the 1973 Insurance Agreement he helped draft did not guarantee welfare benefits beyond the expiration of the collective bargaining agreement and his letters to several retirees flatly stating:

> "There is nothing in the collective bargaining agreement itself, or in the Insurance and Health Agreement which guarantees retirees' benefits for life, nor is there any language in these agreements that talks about vesting of these benefits, and these benefits will expire of their own force on May 1, 1982.
>
> "Pensions, unlike health and welfare benefits, are paid from an actuarially predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid for by the employer contributions and last only for the life of a collective bargaining agreement."

Compare Pet. 6 *with* App. 7-8.

Any fair reading of the lower court opinions demonstrates that petitioners' repeated references to evidence that lower courts "ignored," "rejected" or otherwise disregarded reflect determinations on credibility and the weight of evidence rather than any refusal to consider evidence petitioners proffered. For example, petitioners say the Court of Appeals "rejected" evidence about continuation of benefits during strikes, when in fact the court directly considered that proof, contrasted it with the strike-related evidence in other cases, and concluded that "the facts in this case do not support" petitioners' argument. *Compare* Pet. 7 *with* App. 13 n. 3.

Finally, petitioners' description of the reasoning and analysis of the lower courts is simply not accurate. For example:

1. Petitioners state that the Eighth Circuit held that the 1978 "summary plan description need not be used by the trier to construe the ambiguous terms of the formal document or to derive intent absent a prior showing of worker reliance" (Pet. 7). Indeed, this characterization of the Eighth Circuit's holding represents the entire second question raised by the Petition. *See* Pet. 20-21. The Court of Appeals did, however, consider that document on the issue of intent, and after such consideration it reaffirmed the conclusion of the district court that the "SPD" was not controlling in light of all the evidence, including the determinations of witness credibility. App. 15.

2. Petitioners apparently claim that the Eighth Circuit held as a matter of law "under law and custom that benefits for retirees expire with the expiration of the labor agreement, unless retirees *prove* the drafters actually intended the benefits were to last for retirees' lifetime" (Pet. 6, emphasis in original). *See also* Pet. 10, 12-13. In the same vein, the Petition repeatedly says that the Eighth Circuit required the class to prove that the subjective intent of the parties was consistent with the SPD. Pet. 10, 15, 16-17. One searches in vain for either of these supposed holdings. To the contrary, the Court of Appeals merely held that whether the benefits extended beyond the

duration of the agreement which created them depended on the intent of the contracting parties, and that petitioners, like any plaintiffs, had the burden of proof on their claims. App. 9-10. There is no reference to "subjective" or "undisclosed" intent anywhere in the Court of Appeals' legal analysis. *See* App. 12-17.

3. The allegation that the Eighth Circuit "would give no consideration to trust principles, nor consider the purposes of ERISA or whether ERISA requirements had been met" (Pet. 6) is also flatly untrue. The lower courts' search for the intent of the parties is, of course, a trust principle as well as a contract requirement. SCOTT ON TRUSTS, 3d Ed. 1967 § 164.1 The Court of Appeals carefully studied and distinguished the different Congressional purposes behind the differing treatment of welfare benefits and pension benefits; it then concluded that its decision was consistent with the ERISA policies specifically applicable to welfare benefits. App. 8-11. And the Court of Appeals expressly considered the ERISA requirement of an accurate summary plan description. It did not, as petitioners claim, decide that this requirement only applied to pensions; petitioners failed to recover on their claims based on the 1978 SPD because they did not offer a scintilla of evidence that anyone did anything in reliance on that document. *Compare* Pet. 14 *with* App. 16-17.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Is Based on the Distinctive Contractual Arrangement Between the Parties, Which Has No Precedential Effect for Other Cases, and on Findings of Fact That Will Not Be Reviewed by This Court.

Taking the facts as found by both lower courts, as opposed to the facts described in the Petition, the decision below is plainly a correct determination of the legal consequences of certain unique contractual agreements. The precedential effect of such a decision is sharply circumscribed.

Furthermore, the result below rests on factual findings made by the district court and basically accepted, with minor caveats or supplementations, by the Court of Appeals. Since there are no extraordinary reasons shown, in these circumstances this Court would not and should not review those factual determinations. *Goodman v. Lukens Steel Co.*, ____ U.S. ____, 107 S. Ct. 2617 (1987); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949). Accordingly, it would be pointless and unproductive to grant a writ of certiorari.

II. The Questions Presented by Petitioners Are Completely Fact-Based and Are Not Actually Framed by the Facts Found by the Lower Courts.

A writ of certiorari should not be granted to review the second question presented by petitioners for the simple reason that it is in no way raised by this case. As noted above, the lower courts *did* use the summary plan description in construing plan terms. *See* App. 15. Petitioners' grievance is simply that the lower courts, after doing so, did not find that isolated piece of evidence dispositive and did not resolve the evidence in the way hoped for by petitioners. The second question presented is therefore academic to this lawsuit and does not merit review. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Review of the first question presented by petitioners is also unwarranted for several similar reasons. To the extent the question is directed toward a purported failure to apply "trust principles," it is again simply not presented by this case because petitioners have mischaracterized the opinion of the Court of Appeals. The courts below did apply the settled trust principle that focuses on the intent of the parties. Petitioners are merely quibbling with the application of that principle to these particular facts and, indeed, with the findings of facts by the lower courts. This Court does not grant certiorari to review such matters. *E.g., General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178 (1938).

To the extent the first question calls for creation of a new burden of proof, shifted to a different party based on the language of a summary plan description, it does not merit review because it turns on the contents of a distinctive document and is therefore not of general importance. Moreover, petitioners have neglected to tell the Court several key facts which demonstrate that the record does not provide a basis for resolution of the issue they attempt to frame. This Court should plainly not strain to grapple with the question presented on this record. *See Weber v. Opera on Tour, Inc.,* 314 U..S. 615 (1941).

First, the 1978 SPD did not apply to all Alpha's retirees; it covered only workers who retired after 1978. App. 50. In November 1977, however, Alpha distributed to all already retired hourly employees a summary plan description, applicable to both the pension and welfare benefit plans, which stated in pertinent part that Alpha reserved "the right to terminate the plans should business conditions warrant it" and that only certain pension benefits would be paid thereafter. Tr. 2:231-32; Exhibit S-2, p. 29. This 1977 SPD, issued to pre-1978 retirees, certainly could not in any way be read to describe welfare benefits as guaranteed for life.

Second, this case is not appropriate for creating a new burden of proof based on the 1978 SPD because the meaning of that document was not definitively resolved below. There was substantial evidence that it did not express a lifetime guarantee,[3/] and this Court should not use petitioners' argument about its meaning as a springboard for plenary review.

Third, the legal significance of the SPD was also not resolved below because it was unnecessary for the lower courts to do so. In view of the text of the collectively-bargained agreements, the testimony of their drafters and the conduct of the parties, petitioners' theory of SPD primacy is inconsistent with the federal statutes and policies supporting collective bargaining. Again, this Court should not make new law in a case where such a basic issue was not decided below.

[3/] The 1978 SPD was prepared by Alpha without collective bargaining and was issued subsequent to the collective bargaining that resulted in the definitive 1978 plan instrument. That 1978 collectively-bargained agreement (like earlier agreements) did not say a word about retiree welfare benefits being for life, and the Union president forthrightly admitted that it did not provide lifetime benefits. The SPD contained the express statement that the plan was "maintained under a collective bargaining agreement" (Exhibit E-1, p. 15), and it advised the active employees, "[I]f you have a specific question you should consult the plan document . . ." (*id.* p.i). Furthermore, there was direct evidence that the 1978 SPD could be read as simply confirming that benefits for retirees' spouses did not survive the retirees' deaths and therefore as not referring at all to the duration of an obligation to provide welfare benefits to retirees. App. 59; Tr. 2:249-51; 4:4-6, 11-12; Miechur deposition 213-14.

III. The Alleged Conflicts Among the Circuits Are Largely Illusory and Are Not Related to the Questions Presented by Petitioners, and There Is No Other Need for Review To Provide Uniformity.

Petitioners consistently and seriously overstate any differences among the circuits. Petitioners do not and cannot show that a single other circuit has affirmatively answered the first question they pose, and we submit that this failure alone sounds the death knell for certiorari review of that question. The Eighth Circuit correctly noted that even the Sixth Circuit has not actually adopted petitioners' theory. *See* App. 10.

Nor is it accurate to say that the Ninth Circuit expressly "sides with the Sixth Circuit" (Pet. 12). In *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984), that circuit merely reversed a grant of summary judgment to the employer — it did not resolve the merits or create a new burden of proof. Indeed, in *Turner v. Teamsters Local Union No. 302*, 604 F.2d 1219 (9th Cir. 1979), the Ninth Circuit held that welfare benefits were not guaranteed beyond the expiration of a collective bargaining agreement.

Similarly, and again contrary to petitioners' claims, the Fourth Circuit has not in any way suggested that an employer's obligation to provide retiree welfare benefits presumptively extends beyond a contractual term applicable to that obligation or is subject to a novel burden of proof. *See District 29 (UMW) v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985).

Petitioners cite a number of cases that reach a different result than the Eighth Circuit did here. The Court of Appeals carefully and accurately distinguished on the facts many of these cases, thus highlighting that these cases are fact-based and not fungible. *See, e.g.*, App. 12 n.2 & 14 n.4.

There are, of course, other cases finding that particular retiree welfare benefits were not guaranteed for life. *E.g., International Union (UAW) v. Roblin Industries*, 561 F. Supp.

288 (W.D. Mich. 1983). The lesson of such an exercise is merely that all such cases, including this one, involve and turn on their respective, different facts. Accordingly, petitioners' grandiose claims about the broad economic impact of review are simply overblown rhetoric. The Court does not and should not review cases when the decision below does not involve an important question of general impact, even if there is an appealing underlying context (*i.e.*, retirement benefits).

This case is totally unrelated to ***Firestone Tire and Rubber Co. v. Bruch***, No. 87-1054, 56 U.S.L.W. 3682 (1988). Petitioners' first question is not, as they allege (Pet. 2, 16), presented by that case. As discussed in more detail in the opposition filed with this Court in the related case of ***DeGeare v. Slattery Group, Inc.***, No. 87-2070, the resolution of ***Bruch*** could not possibly affect the result in this case. Alpha has already prevailed under a neutral standard similar to that used by the Third Circuit in ***Bruch*** less favorable to Alpha than that which might be adopted by this Court.

There is certainly no existing precedent of this Court that would dictate creation of an extraordinary burden of proof in this case. This Court did not impose any such burden of proof in ***Schneider Moving & Storage Co. v. Robbins***, 466 U.S. 364 (1984), or ***Lewis v. Benedict Coal Corp.***, 361 U.S. 459 (1960). The Court in ***Robbins*** looked to the same evidence the Eighth Circuit used in this case — the governing agreements and the surrounding circumstances. ***See*** 466 U..S. at 372-73. The result in ***Robbins***, like the result below, stemmed from the absence of sufficient evidence to support the interpretation proposed by the petitioners. To the extent that ***Lewis*** involved interpretation

of the contract, the Court also used normal contract principles. *See* 361 U.S. at 465-66.[4/]

Finally, review of this case is not necessary to implement ERISA and would not contribute to that statute's application by other courts. In fact, the first question presented totally misapprehends the statutory structure and purposes of ERISA. As the Eighth Circuit observed, Congress did *not* provide that summary plan descriptions shift the burden of proof or affect that burden in any way. As the Eighth Circuit also noted, the circuits have *uniformly* held that a claim to recover benefits based directly on the terms of a summary plan description requires proof of reliance. App. 16. *See also Bachelder v. Communications Satellite Corp.*, 837 F.2d 519 (1st Cir. 1988) (reversing a district court case relied on below by petitioners and canvassing other circuits).

There is no other ERISA-based policy that would justify this Court's consideration of a new and novel burden of proof for retiree welfare benefit cases. The Eighth Circuit correctly noted that Congress distinctly exempted welfare benefits from the requirements of vesting, funding and non-forfeitability imposed by ERISA to prevent loss of pension benefits. App. 9. There are sound practical reasons, based on the uncertainties associated with welfare benefits, why such benefits frequently are not and should not be guaranteed for life. *See* App. 56.

[4/] Petitioners' suggestion that *Ft. Halifax Packing Co. v. Coyne*, ___U.S.___, 107 S.Ct. 2211 (1987), is inconsistent with the decision below is unfounded. In *Ft. Halifax*, this Court simply applied the text of ERISA'S preemption section, 29 U.S.C. § 1144(a), which expressly refers to a plan and not to benefits. This case, in contrast, is brought under 29 U.S.C. § 1132, which only provides jurisdiction to sue for benefits due "under terms of his plan" or to enforce rights associated with "the terms of the plan." *See* App. 67. The Court of Appeals therefore had no authority to award benefits not guaranteed by the plan as interpreted by the court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

MICHAEL G. BIGGERS
(Counsel of Record)
GEORGE S. HECKER
500 N. Broadway
St. Louis, Missouri 63102

Attorneys for Respondent
Slattery Group, Inc.

BRYAN, CAVE, MC PHEETERS & MC ROBERTS
Of Counsel
July 1988

No. 87-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT ANDERSON, JR., *et al*
Petitioners,

v.

SLATTERY GROUP, INC., *et al*
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

SHELDON WEINHAUS
906 Olive Street, Suite 900
St. Louis, Missouri 63101
314/621-8363

Attorney of Record
for Petitioners

LEVIN and WEINHAUS
906 Olive Street, Suite 900
St. Louis, Missouri 63101

Of Counsel

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 87-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT ANDERSON, JR., *et al*
Petitioners,

v.

SLATTERY GROUP, INC., *et al*
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

I.

Another circuit joins the Sixth Circuit in conflict with the Eighth Circuit, enhancing the need for a uniform approach amongst the circuits

Three weeks before the respondents filed their reply to the petition for a writ, the Eleventh Circuit in *United Steelworkers v. Connors Steel Co.*, 847 F.2d 707 (11th Cir. 1988) ("*Connors*"), expressly adopted the views of the Sixth Circuit both in approach and in the interpretation of formal plan provisions similar to those in the instant case. The termination clause

in *Connors* was as broad as and certainly more inclusive than the duration clause in the instant plan. The Eleventh Circuit did not find the termination clause "inconsistent" with an intent to vest. Rather, it agreed with the Sixth Circuit's demand that for a duration clause to be construed as the Eighth Circuit does, the clause would be required to expressly refer to the duration of *benefits*.[1]

The Eleventh Circuit in *Connors* also agreed that under the decided cases involving retiree insurance benefits it is not unique for such benefits to continue after expiration of the labor agreement, thus joining in the conflict with the Eighth Circuit's holding that by law and custom such benefits cannot be expected to continue beyond the term of the labor agreement. In further conflict with the Eighth Circuit, the Eleventh Circuit also held a plan provision allowing amendment is not inconsistent with a vesting intent. The Eleventh Circuit did not find the written expression that benefits will continue "except as the company and the union may agree otherwise," a statement inconsistent with any vesting intent.

The Eleventh Circuit in *Connors* also said that meaning be given to other clauses that do say when benefits terminate. There were such clauses in the instant case, yet the trial court did not use them for analysis and the appeals court ignored them in its analysis.

---

[1] On page 9 of their memorandum respondents urge that a vague reference in the 1978 SPD to a collective bargaining agreement, constitutes unequivocal disclosure that the labor agreement's termination clause applies to all plan benefits. That vague reference does not meet the requirements of 29 U.S.C. §1022(b) ("a description of the relevant provision of any applicable collective bargaining agreement"). Nor does it meet the Secretary's regulations cited in the petition for the writ at note 5, page 15. The Courts below did not suggest this SPD reference meaningful or in compliance with ERISA.

II.

Respondents assert evidence the lower court decisions never found. No evidence was found of unequivocal disclosure of respondents' non-vesting intent prior to respondent's 1981 decision to terminate

Respondents on page 6 argue that because there was no explicit finding by the lower courts expressly stating the drafters' intent was undisclosed, it must be presumed that there was disclosure. No evidence was offered at trial respondents disclosed their intent before the 1981 termination decision, beyond the documentation to which the courts below made reference.[2]

The lower courts found no objective acts of disclosure not discussed in the petition for the writ. The petition for the writ noted the lower courts did view the mid-60's negotiation of coordination of benefits with Medicare as objective evidence by which they concluded the retirees should have understood their benefits were not vested. In evaluating the evidence the courts below ignored the then-current practice to allow labor unions to bargain for retirees as a mandatory subject of bargaining, a practice rejected six years later in *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971). Respondents' documented and uncontested notice to retirees of that mid-60's coordination, told retirees that "coverage will be greater under the coordinated plans and in no event will it by any less than your present company coverage," exhibit 466, on

---

[2] Respondents on page 8 purport a 1977 document which neither of the courts below even considered relevant or found had been sent to anyone. Petitioners denied receipt. There was no evidence it was filed with the Secretary under 29 U.S.C. §1021(a)(1). The document respondents appear to refer to is incomprehensible unless one pulls a phrase out of context. The courts below found only one SPD to exist, and that was found to be "faulty" because it indicated that the benefits continued for life, which was found contrary to the drafters' intent.

the basis of which the courts below attirbuted to retirees the understanding that their benefits were subject to reduction and were therefore transitory. See respondents' brief at 3 n.2.[3]

III.

The instant case raises trust questions

This Court determined unequivocally that ERISA plans are to have an "equitable character." *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985). One such equitable principle the review by this Court in the *Firestone Tire & Rubber Co. v. Bruch*, docket No. 87-1054, will entail, if trust law is to be applied to ERISA contract violations, is the deter-

---

[3] On that same page of its brief respondents complain about a statement in the petition for the writ that "Alpha offered no testimony from any of its 1965 benefit negotiators." Respondents suggest that both lower courts found there was such testimony. Although the Eighth Circuit did refer to respondents' witnesses Bonstein and Loveridge as respondents' "negotiators" generally, that opinion does not find that either were *actual participants* in the specific 1965 benefit negotiations. Both respondents' witnesses Bonstein and Loveridge testified that they did not directly participate in the 1965 benefit negotiations. Respondents' own historical reports list their representatives present at the negotiations; not a single person listed testified. The district court in its opinion, A31, referred to a single "negotiating representative," but did not find that that representative — Loveridge — actually participated in face-to-face negotiations on benefits in 1965. At trial respondents' counsel conceded his non-presence but insisted that Mr. Loveridge should be allowed to testify as to his understanding because he was "copied on all the documents . . . and he was area coordinator." Trial transcript 3-38 lines 16-18. Thus the district court was constrained to rely upon what the respondents' negotiating representative "understood" the phrase "until death of retiree" to mean, A31, rather than on testimony as to what negotiators actually said.

Petitioners' petition for the writ does not propose need for reviewing this finding as to what respondents "understood." Respondents' attempt to create factual dispute for review suggests the wisdom of requiring disclosed objective, unequivocal evidence when the district court finds participants are told benefits continue until they die.

mination whether respondents' conduct is arbitrary and capricious. Ordinarily if the worker puts in the requisite years of service, then notwithstanding the employer's express reservation of a right to change benefits, it follows that the employee is entitled to receive retirement benefits. *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 5-6 (1st Cir. 1978), cert den'd 440 U.S. 913 (1979).[4]

Another essential aspect of ERISA trust law is that undisclosed intent is immaterial, contrary to respondents' apparent suggestion on page 6 that intent controls under trust law even if never disclosed in objective, unequivocal fashion.

---

[4] The First Circuit in *Hoefel* recognized courts view retirement benefits as a form of "deferred compensation." 581 F.2d at 5. See also *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. at 180 ("future retirement [insurance] benefits are part and parcel of . . . overall compensation."). The First Circuit went on to note retirement benefits are offered by the employer "as a means of obtaining a more stable and productive work force." 581 F.2d at 5. This is consistent with that circuit's later decision *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519 (1st Cir. 1988), in which the court cited with approval *Duldulao v. Saint Mary of Nazareth Hosp.*, 505 N.E.2d 314, 319 (Ill. 1987) for saying: "There is no question but that plaintiff continued to work with knowledge of the handbook provisions. Under these circumstances the handbook's provisions became binding on the employer." 837 F.2d at 523.

Thus the First Circuit now appears to conflict with the Eighth Circuit as to what constitutes evidence of reliance. In the instant case workers would ratify the labor agreement only after asking about and receiving assurances that retirees' benefits were for life. Respondents issued the 1978 SPD continuing such assurance before the last ratification vote. The Eighth Circuit rejected this as evidence showing reliance.

CONCLUSION

The lower courts were quite specific as to what evidence they considered relevant and what conclusions they drew therefrom. There is no dispute as to the factual findings of the lower court as to what information was given to the workers. The instant case best frames the conflict between the Eighth Circuit and all the other circuits which have addressed the question of retirees' insurance benefits. If the Eighth Circuit is correct, it will save employers retiree health care costs estimated by the Congressional Select Committee on Aging to be anywhere from half a trillion to three trillion dollars, and with the same stroke either shift these costs to the taxpayer or make the older Americans do without the health care they were promised was for their lives. Review by this court is merited.

Sheldon Weinhaus
906 Olive Street, Suite 900
St. Louis, MO 63101
(314) 621-8363

Counsel of record for petitioners

LEVIN and WEINHAUS
906 Olive Street, Suite 900
St. Louis, MO 63101

Of Counsel

(5)

No. 87-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT ANDERSON, JR., *et al*
Petitioners,

v.

SLATTERY GROUP, INC., *et al*
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

SHELDON WEINHAUS
906 Olive Street, Suite 900
St. Louis, Missouri 63101
314/621-8363

Attorney of Record
for Petitioners

LEVIN and WEINHAUS
906 Olive Street, Suite 900
St. Louis, Missouri 63101

Of Counsel

St. Louis Law Printing Co., Inc.. 13305 Manchester Road 63131 314-231-4477

17pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 87-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT ANDERSON, JR., *et al*
Petitioners,

v.

SLATTERY GROUP, INC., *et al*
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

I.

PETITIONERS ADVISE THE COURT OF TWO RECENT DECISIONS FROM OTHER CIRCUITS IN CONFLICT WITH THE DECISION FOR WHICH REVIEW IS SOUGHT

Pursuant to Supreme Court Rule 22.6 petitioners bring to the Court's attention two decisions issued since the filing of petitioners' reply brief. One is by the United States Court of Appeals for the Second Circuit, *Moore v. Metropolitan Life Ins. Co.* ("Moore"), issued earlier this month, reprinted in the ap-

pendix hereto, pages A-69 to A-77.[1] The second decision in *Edwards v. State Farm Mut. Auto Ins. Co.* ("Edwards"), 851 F.2d (6th Cir. 1988).

II.

FURTHER CONFLICT EXISTS WITH THE EIGHTH CIRCUIT WITH RESPECT TO ATTEMPTS BY PARTIES TO PROVIDE EXTRINSIC EVIDENCE TO CHANGE TERMS OF THE SUMMARY PLAN DESCRIPTION

Although there could be no irreconcilable conflict between the summary plan description (benefits continue "for the remainder of your life") and the formal plan terms since the district court found the formal terms ambiguous, A-11, the Sixth Circuit in *Edwards* held the summary plan description ("SPD") binding even if in irreconcilable conflict with the formal terms of the plan. 851 F.2d at 136, 137. The Eighth Circuit disagrees, going so far as to allow non-objective parol evidence to be used to establish such a conflict and "fault" the SPD. The Second Circuit in *Moore* prohibited the use of extrinsic evidence to change the formal plan terms or the summary plan description.[2] A-75 to A-77. The Second Circuit in *Moore* held that the parties as a matter of substantive ERISA law are restricted sole-

---

[1] Numerical sequence of the Appendix follows the pagination in the original Appendix filed by petitioners. A-69 is the first page of the attached Appendix.

[2] In *Moore* both the plan and SPD expressly allowed amendment and termination of *benefits*. The plan agreement in the instant case contains no express language with respect to termination of *benefits*. The summary plan description in the instant case makes no reference to termination of either plan or benefits, but expressly assures each retiree that benefits will continue cost-free "for the remainder of your life."

ly to two documents: the plan and the summary plan description. It stated that the use of other extrinsic evidence

> "would undermine ERISA's framework, which ensures that plans be governed by written documents filed under ERISA's reporting requirements and that SPDs, drafted in understandable language, be the primary means of informing participants and beneficiaries." A-76

The Second Circuit in *Moore* further emphasized that restricting the Court's consideration to the two documents serves the function of predictability that Congress intended to establish. A-76. In the instant case, having accepted the district court finding that the terms of the formal plan were ambiguous, A-11, the Eighth Circuit allowed testimony of actual intent years before, never disclosed until the years-later termination decision was made, as evidence to be used to find the clear summary plan description "faulty," and thus an instrument unworthy to use for prediction.

Moreover, the Eighth Circuit would permit a claim founded on a summary plan description found "faulty," only upon a showing of detrimental reliance. The Second Circuit in *Moore,* A-77, and the Sixth Circuit in *Edwards,* 134 F.2d at 137, clearly make the factor of detrimental reliance irrelevant in an ERISA case, thus intensifying the conflict with the Eighth Circuit.

III.

IN CONFLICT WITH THE EIGHTH CIRCUIT THE SECOND CIRCUIT DOES NOT ACCEPT A CONTRACT THEORY UNDER ERISA

The Second Circuit in *Moore* indicates that contract theories have no place in an ERISA claim. A-75 to A-76. In conflict, in the instant case both the district court, A-56, and the court of appeals approach benefit cases as sounding solely in contract.

CONCLUSION

The recent Second and Sixth Circuit decisions continue the conflict in the circuits and demonstrate the urgent need for this Court to address the questions presented where plan terms are found to be ambiguous: under ERISA what is the appropriate source or sources for interpretation. The instant case best presents the question for resolution.

Sheldon Weinhaus
906 Olive Street, Suite 900
St. Louis, MO 63101

Counsel of record for petitioners

LEVIN and WEINHAUS
906 Olive Street, Suite 900
St. Louis, MO 63101
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 641 — August Term, 1987

(Argued February 3, 1988 Decided September 2, 1988)

Docket No. 87-7793

RICHARD A. MOORE and MARY AMSTAD, on behalf of themselves and as representatives of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a mutual company incorporated in New York State,

Defendant-Appellee.

Before:

LUMBARD, WINTER and ALTIMARI,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Peter K. Leisure, *Judge*) granting summary judgment for defendant in an ERISA action seeking to prevent a change in medical benefits for a class of retirees formerly employed by defendant. Because defendant's ERISA plan unambiguously reserved defendant's right to amend or terminate the plan, we affirm.

IRVING R. M. PANZER, Washington D.C. (Daniel J. Gatti, Gatti, Gatti, Maier & Smith, Portland, Oregon; Tas Coroneos, Chevy Chase, Maryland; Stanley Heisler, New York, New York, of counsel), *for Plaintiffs-Appellants.*

LARRY M. LAVINSKY, New York, New York (Robert J. Kochenthal, Jr., Proskauer Rose Goetz & Mendelsohn, New York, New York, of counsel), *for Defendant-Appellee.*

WINTER, *Circuit Judge:*

Defendant-appellee Metropolitan Life Insurance Company ("Metropolitan") maintains medical benefit plans for its employees under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1982). These plans contain provisions unambiguously reserving Metropolitan's right to amend or terminate them. Pursuant to that reservation of rights, Metropolitan has amended the plan numerous times, usually augmenting benefits, but sometimes diminishing them. This appeal presents the question of whether Metropolitan may be barred from altering benefits under the plans by various communications to its employees that described the plans as, *inter alia,* providing "lifetime" benefits "at no cost." We hold that the unambiguous provisions of the plan must govern, because altering a welfare benefit plan on the basis of non-plan documents and communications, absent a particularized showing of conduct tantamount to fraud, would undermine ERISA. Accordingly, we affirm.

BACKGROUND

Metropolitan has provided group health insurance to its employees for over seventy years. Metropolitan presently maintains a multipart Insurance & Retirement Program ("I & R Program") for eligible employees and field representatives. At issue are the medical plans provided under two parts of the I & R Program. The first is the Comprehensive Medical Expense Plan, covering both active employees and retirees under the age of 65 ("Comprehensive Plan"). The second is the Supplementary Medical Expense Plan, covering retirees 65 years of age and older ("Supplemental Plan").

Metropolitan's medical plans constitute welfare benefit plans under Section 3(1) of ERISA, 29 U.S.C. § 1022(a)(1). ERISA requires that the plan administrator, here Metropolitan, file a "plan description" with the Secretary of Labor and furnish plan participants and beneficiaries with a summary plan description ("SPD") "written in a manner calculated to be understood by the average plan participant, and . . . sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights . . . under the plan." 29 U.S.C. § 1022. *See also* 29 U.S.C. §§ 1021, 1024. Metropolitan issued its initial SPD when the SPD requirement first became effective in 1977, and issued a second SPD in 1984. Both SPDs unambiguously reserved to Metropolitan the right to change or discontinue the medical expense plans. The 1977 SPD thus stated: "The Company expects to continue the Metropolitan Insurance and Retirement Program and the other employee benefit plans. However, it reserves the right to change or discontinue any portion of the benefits described in this summary." The 1984 SPD included similar language, under the heading "Change or Discontinuance of Plan."

Over the years, Metropolitan has published booklets other than SPDs explaining its group insurance benefits. With one exception, each of these booklets unambiguously reserved to Metropolitan the right to amend or terminate the benefits offered. For example, as early as 1915, the company used the following language:

> These rules may be modified or repealed by the Company's Executive at any time and without prior notice; the Company reserves the right to withdraw, at any time, and without prior notice, any or all contributions, bonuses, allowances or privileges provided for by these rules.

More recent booklets have contained language similar to the following:

CHANGE OR DISCONTINUANCE OF PLAN

> The Company reserves the right at any time to change or discontinue this Supplementary Medical Expense Plan, except that any change shall be subject to the approval of the Superintendent of Insurance of the State of New York.

The single booklet omitting an express reservation of a right to amend or terminate was published in 1976 — after ERISA was enacted in 1974, but before final regulations governing SPDs were promulgated in 1977. However, the following statement appeared on the booklet's inside front cover:

> This summary describes briefly, in general terms, the important provisions of the Metropolitan Insurance and Retirement Program and other Company benefits. Complete details, terms, and conditions are contained in Plan Documents and Group Contracts. The specific language of the Plan Documents and Group Contracts will govern in every respect and instance.

Metropolitan has also communicated with its employees and retirees concerning its I & R Programs in other ways. Filmstrips have been used to explain and promote the various benefits available under its different plans. Metropolitan's managers and supervisors are given materials to be used in conjunction with these filmstrips and are encouraged to make an effort to convey to the company's employees the details of the various coverages. Articles explaining Metropolitan's various I & R Programs have also appeared in Metropolitan's employee newspapers as well as in specific memoranda and letters to active employees and retirees. Metropolitan's right to amend or terminate benefits was generally not stated in these various presentations. Moreoever, these presentations occasionally described these benefits as being for the employee's "lifetime," and "at no cost."

Over time, Metropolitan has made numerous changes in its medical plans. While most of these changes have broadened coverage, some have diminished particular benefits. For example, prior to 1979, the annual deductible amount under both the Comprehensive and Supplementary Plans was $50 per person/$100 maximum per family. Effective January 1, 1979, the Comprehensive Plan deductible was doubled to $100 per person/$200 per family. Because the Comprehensive Plan covers retirees under the age of sixty-five as well as active employees, the 1979 change raised the deductible amount for some retirees. Contributions have also changed over the years. Prior to 1975, the Comprehensive Plan had been contributory for over thirty years. Effective mid-1975 and 1976 (depending upon employment classification), it became non-contributory. On May 1, 1978, however, it was made contributory again, in conjunction with the addition of a dental plan and improvements in the Comprehensive Plan.

The changes in the medical plans that precipitated this lawsuit occurred in 1984 and 1985. In January 1984, the deductible amount was raised to $356 per person/$712 per family. The Medicare deductible, formerly eligible for reimbursement, was made ineligible. In December 1984, the deductible was increased again, to $400 per person/$800 per family. Another increase in 1985 raised the deductible to $424 per person/$848 per family.

The named plaintiffs in this suit are retired Metropolitan employees. They purport to bring the action on behalf of the class of all retirees, surviving spouses, and disabled employees of Metropolitan eligible to receive benefits under the welfare provisions of Metropolitan's I & R Program. Count One of the complaint claimed that, under ERISA, Metropolitan lacked the power to change these benefits. Count Two alleged that such changes were a breach of a unilateral contract between Metropolitan and its retirees. Count Three asserted an estoppel theory. Count Four alleged that Metropolitan was barred from

making changes in its welfare plan because its SPDs failed to meet the notice requirements of Section 102(b) of ERISA, 29 U.S.C § 1022(b). Count Five argued in the alternative that this failure to publish proper SPDs under Section 102(b) required a payment of damages even if such a failure did not in itself bar Metropolitan from making these changes.

Following discovery, Metropolitan moved for summary judgment, and the district court granted the motion. Because plaintiffs conceded that there is no "automatic vesting" of welfare benefits under ERISA, the court dismissed Count One. As to Count Two, the district court held that Metropolitan's plan and SPDs, which contained unambiguous reservations of the right to amend or terminate, were controlling and that extrinsic evidence could not be considered. As to Count Three, the district court found no basis for an estoppel claim in ERISA or the federal common law and held that ERISA itself positively precludes informal written modifications of employee benefit plans of the kind necessary for plaintiffs' estoppel theory to succeed. Finally, the district court found that the plaintiffs misunderstood the notice requirements for SPDs in ERISA Section 102(b), and that Metropolitan's SPDs amply satisfied those requirements. Because plaintiffs have abandoned Counts One, Two and Three on appeal, only the unilateral contract and estoppel claims are before us.

DISCUSSION

ERISA regulates pension plans far more extensively than welfare plans. For example, welfare plans are expressly exempted from the Act's detailed minimum participation, vesting and benefit-accrual requirements and are not subject to ERISA's minimum-funding requirements. As explained by Committees of both the House and Senate, the term "accrued benefit"

> refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical in-

> surance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

H.R. Rep. No. 93-807, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726; S. Rep. No. 93-383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4935.

Automatic vesting does not occur in the case of welfare plans, and Metropolitan clearly reserved in the plan documents and in the SPDs the right to amend or terminate the plans at issue. Plaintiffs are therefore driven to argue that the "contract" between themselves and Metropolitan "consists of the totality of the representations made to the employees by the Company, and the actions of the employees in accepting those representations by remaining with the Company."[1] We disagree.

Congress intended ERISA "to occupy fully the field of employee benefit plans and to establish it 'as exclusively a federal concern.' " *Gilbert v. Burlington Indus. Inc.*, 765 F.2d 320, 326 (2d Cir. 1985) (ERISA preempts statutory and common law claims) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)), *aff'd*, 477 U.S. 901 (1986). Section

---

[1] Plaintiffs rely upon three cases to support their argument that extrinsic evidence is admissible to vitiate a right to amend or terminate a clause in ERISA plan documents: *Musto v. American Gen'l Corp.*, 615 F.Supp. 1483 (M.D. Tenn. 1985); *Eardman v. Bethelhem Steel Corp.*, 607 F.Supp. 196 (W.D. N.Y. 1984); *appeal dismissed*, 755 F.2d 913 (2d Cir. 1985); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986). Actually, however, *Musto*, *Eardman* and *Amato* bar consideration of extrinsic evidence where a welfare benefit plan unambiguously reserves the plan administrator's right to amend and terminate the plan.

514(a) of ERISA, 29 U.S.C. § 1144(a), expressly states that the provisions of the Act "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . ."

Plaintiffs' argument, if accepted, would undermine ERISA's framework which ensures that plans be governed by written documents filed under ERISA's reporting requirements and that SPDs, drafted in understandable language, be the primary means of informing participants and beneficiaries. *See* 29 U.S.C. § 1022(a)(1) (SPD must be provided to participants and beneficiaries), § 1022(a)(2) (plan description to be filed with Secretary of Labor), § 1102(a)(1) (every plan to be established and maintained pursuant to a written instrument), and § 1102(b)(3) (requiring plan to specify amendment procedures); *see also Nachwalter v. Christie,* 805 F.2d 956, 960 (11th Cir. 1986) (disallowing oral revisions to ERISA plans).

Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created.

With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and

technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs. While these plaintiffs would be helped by a decision in their favor, such a ruling would not only fly in the face of ERISA's plain language but would also decrease protection for future employees and retirees.

We therefore conclude that, absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries. No such showing has been made here. The record contains no hint of bad faith, intent to deceive or even conduct that was objectively, if unintentionally, misleading on Metropolitan's part. The SPDs and all but one booklet have for over seven decades indicated in a straightforward way Metropolitan's reservations of a right to amend or terminate. The single booklet omitting an express reservation of the right to amend or terminate medical benefits expressly noted that it was not a complete statement of the terms of the plans and was not the governing document. Likewise the filmstrips and other presentations did not purport to be complete binding statements of plan terms. While the use of language such as "lifetime" or "at no cost" might conceivably create a triable issue of fact on a contract theory, it does not constitute the kind of misleading behavior that would cause us to override plan documents and SPDs created pursuant to ERISA.

Affirmed.